No. _____

Supreme Court, U.S.
FILED

931902 MAY 31 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,

Petitioner,

—v.—

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

PETITION FOR A WRIT OF CERTIORARI

CAROLE O'BLENES
Counsel of Record
Proskauer Rose Goetz
& Mendelsohn
1585 Broadway
New York, New York 10036
(212) 969-3000

DANIEL R. DOMINGUEZ
Dominguez & Totti
416 Ponce de Leon Avenue
Hato Rey, Puerto Rico 00918
(809) 753-7910

Attorneys for Petitioner

SAUL G. KRAMER
WENDY L. KORNREICH

Of Counsel

QUESTIONS PRESENTED

Prior to July 6, 1989, the Puerto Rico Port Authority was party to collective bargaining agreements with Respondent unions under which the Port Authority was obligated to allow employees, without limitation, to accrue or "bank" vacation days in excess of the minimum required by law for later use or for liquidation in cash upon their separation from employment. Effective July 6, 1989, the Puerto Rico Minimum Wage Board amended its transportation industry regulation to add a penalty provision requiring that employers pay their employees two days' pay for every vacation day accrued in excess of the number of days that can be accrued in two years. The court below held that the new penalty provision applies to leave that employees elected to bank, in accordance with the terms of the collective bargaining agreements, before the amendment of the regulation. The questions presented are:

1. Whether the retroactive application of the new penalty provision constitutes an impermissible impairment of the collective bargaining agreements prohibited by the Contract Clause of the U.S. Constitution (art. I, § 10, cl. 1).

2. Whether the imposition of the new penalty punishes the Port Authority for preenactment conduct in violation of the Ex Post Facto Clause of the U.S. Constitution (art. I, § 10, cl. 1).

RULE 29.1 LISTING

The Puerto Rico Port Authority does not have any parent companies or any subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LISTING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

The Judgment Below Is In Conflict With The Decisions Of This Court Construing And Applying The Contract Clause And The Ex Post Facto Clause Of Article I, Section 10 9

A. The Retroactive Penalty, as Applied to the Port Authority, Substantially Impaired Pre-existing Contracts Between the Port Authority and the Unions and Is Neither a Reasonable Nor Necessary Means of Promoting the Articulated Public Purpose of the Decree 12

B. The Retroactive Penalty, as Applied to the Port Authority, Violates the Constitutional Prohibition Against Ex Post Facto Laws 23

CONCLUSION 26

Page

Appendix A

Judgment of the Superior Court of Puerto Rico 1a

Appendix B

Arbitration Award 6a

Appendix C

Decision of the Supreme Court of Puerto Rico 24a

Appendix D

Decision of the Supreme Court of Puerto Rico Denying Motion for Reconsideration 28a

Appendix E

Decision of the Supreme Court of Puerto Rico Denying Second Motion for Reconsideration 29a

Notice of Entry of Decision 30a

Appendix F

Statutes Involved 32a

Appendix G

Excerpt from Petitioner's Motion for Reconsideration . 35a

Appendix H

Excerpt from Petitioner's Second Motion for Reconsideration 40a

Page

Appendix I

Opinion No. 91-4 of the Secretary of Labor of Puerto Rico 44a

Consultation No. 12400 of the Solicitor of Labor of Puerto Rico 48a

Appendix J

Stipulation of Facts 50a

Appendix K

Article XXIII of the Collective Bargaining Agreement between Puerto Rico Port Authority and the Brotherhood of Office and Commercial Workers . . 53a

Article XVII of the Collective Bargaining Agreement between Puerto Rico Port Authority and the Cataño Transportation Workers Union 55a

TABLE OF AUTHORITIES

CASES **Page**

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) . . . . . *passim*

Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991) 14

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) 13

Dávila v. Valdejully, 84 P.R.R. 101 (1961) 8

De Veau v. Braisted, 363 U.S. 144 (1960) 23

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 21

Garris v. Hanover Ins. Co., 630 F.2d 1001 (4th Cir. 1980) 21

General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992) 10

Landgraf v. USI Film Prods., No. 92-757, 1994 U.S. LEXIS 3292 (Apr. 26, 1994) . . . . . *passim*

Lopez v. Hospital Presbiteriano, Inc., 107 P.R.R. 197 (1978) 8

McDonald's Corp. v. Nelson, 822 F. Supp. 597 (S.D. Iowa 1993) 14

Page

Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985) 18, 21

Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987) 21

Pamblanco v. Union Carbide Caribe, Inc., 90 P.R.R. 693 (1964) 18

Piovanetti v. Vivaldi, 80 P.R.R. 108 (1957). 8

Puerto Rico Labor Relations Board v. Ventanas Yagüez, Inc., 103 P.R.R. 1308 (1975) 18

Sanchez v. Eastern Air Lines, Inc., 114 P.R.R. 691 (1983) . 8

Santiago Cruz v. Hernández Andino, 92 P.R.R. 709 (1965) . 8

Torres v. Hull Dobbs of Puerto Rico, Inc., 103 P.R.R. 662 (1975) 18

Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) 12-13

United States v. Halper, 490 U.S. 435 (1989) 23-25

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 12

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 13

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 23

STATUTES & CONSTITUTIONAL PROVISIONS **Page**

Law No. 11 of June 2, 1993 7

P.R. Laws Ann. tit. 4, Appendix IA 8

P.R. Laws Ann. tit. 23, § 336 (Supp. 1990) 3

P.R. Laws Ann. tit. 23, § 338 3

P.R. Laws Ann. tit. 23, § 342 3

P.R. Laws Ann. tit. 23, § 346 3

P.R. Laws Ann. tit. 29, § 246b(a) 9

28 U.S.C. § 1258 2

U.S. Const., art. I, § 10, cl. 1 . . . . . 2, 12, 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. ____

PUERTO RICO PORT AUTHORITY,

Petitioner,

—v.—

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

Petitioner, Puerto Rico Port Authority (the "Port Authority"), respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of Puerto Rico, San Juan Division, entered on June 8, 1993.

OPINIONS BELOW

The judgment of the Superior Court of Puerto Rico, which is not reported, is reprinted as Appendix A hereto. It affirms an arbitration award issued through the Conciliation and Arbitration Bureau of the Commonwealth of Puerto Rico Department of Labor

and Human Resources, also not reported, which is reprinted as Appendix B hereto.

The decision of the Supreme Court of Puerto Rico denying discretionary review of the judgment of the Superior Court is reprinted as Appendix C hereto. The decisions of the Supreme Court of Puerto Rico denying the Port Authority's Motion for Reconsideration and its Second Motion for Reconsideration are reprinted as Appendices D and E hereto, respectively.

JURISDICTION

The judgment of the Superior Court of Puerto Rico, San Juan Division, issued on June 8, 1993. The Supreme Court of Puerto Rico denied a petition for review of the judgment on September 10, 1993. The Supreme Court of Puerto Rico denied a timely motion for reconsideration on January 28, 1994. Its decision denying a timely second motion for reconsideration (made as of right under Puerto Rican law) was entered March 1, 1994. This petition is filed within ninety (90) days of that date. The jurisdiction of the court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1258.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions are contained in Article I, Section 10, Clause 1 of the U.S. Constitution, which provides in pertinent part:

> No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts.

The relevant provisions of the Puerto Rico Minimum Wage laws (P.R. Laws Ann. tit. 29, §§ 245 *et seq.*), Mandatory Decree No. 38, and Law No. 96 of 1956 as amended are reprinted as Appendix F hereto.

STATEMENT OF THE CASE

The Port Authority is a public corporation established "to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services, as well as to establish and manage mass marine transportation systems in, to and from the Commonwealth of Puerto Rico."[1] In order to effectuate this purpose, the Port Authority has the power, among other things: to adopt bylaws regarding the manner in which its general business shall be conducted; to set and collect fees for use of its facilities and services; to sue and be sued; "to make contracts and to execute all instruments necessary or convenient in the exercise of its powers"; to acquire and sell property; and to issue bonds. All Port Authority funds are maintained in separate accounts in the Authority's name. The Commonwealth of Puerto Rico is not liable on any debt instrument issued, or other obligation incurred, by the Port Authority.[2]

The Respondents are two of the unions that represent Port Authority employees. The Brotherhood of Office and Commercial Workers ("HEO") represents approximately 840 Port Authority employees, and the Cataño Transportation Workers Union ("UETC"), represents approximately 130 employees of the Port Authority.[3] The Port Authority is party to collective bargaining agreements with each of the Unions.[4]

Each of these Labor Contracts provided for the accrual of paid vacation for employees in excess of the number of vacation

---

1 *See* P.R. Laws Ann. tit. 23, § 336 (Supp. 1990).

2 *Id.* §§ 336(c), (e), (f), (h), (m) & (n); 338; 342 & 346.

3 HEO and UETC are collectively referred to as the "Unions".

4 The collective bargaining agreements are referred to as the "Labor Contracts."

days required by law. Under the Port Authority's agreement with HEO, employees accrued 30 days of vacation per year (53a); and under its agreement with UETC, employees accrued 27 days of vacation per year (55a).[5] This was in contrast to the 15 days of paid vacation then required by Mandatory Decree No. 38 (the "Decree").[6]

Under the Labor Contracts in effect prior to July 6, 1989, employees were entitled each year to elect not to use their accrued vacation in excess of the first 20 days (which encompassed the 15 days required by the Decree) (the "excess vacation") and to preserve the excess vacation — without limitation — for use at a later time or for liquidation in cash upon their separation from employment with the Port Authority, whether by retirement or otherwise. (53a; 14a) Thus, for example, if he or she chose to do so, each HEO-represented employee could in effect "bank" 10 days of paid vacation every year — which could be used later or could serve as a kind of retirement or separation bonus when the employee left the Port Authority.[7]

---

[5] The pages of the Appendices to this petition are referred to as "__a".

[6] Mandatory Decree No. 38 is a regulation of the Minimum Wage Board of Puerto Rico; it establishes minimum standards for wages, overtime pay, paid sick leave and paid vacation in the transportation industry. The Minimum Wage Board is authorized by statute to issue such Decrees for various industries and is required to reconsider the terms of the Decrees biennially. (32a-33a)

[7] While the UETC contract did not contain explicit provisions for the enjoyment of vacation, and the liquidation of accrued vacation upon separation from employment, it was uncontroverted below that the same accrual practices were applied to employees of both Unions and, indeed, that the accrued vacation days at issue in this case resulted from this long-standing practice between the parties. *See* Cataño Labor Contract, Article XVII, Section 3 (55a) ("Regular workers are

(continued...)

Concomitantly, the Port Authority was obligated under the Labor Contracts to allow employees, at their option, to bank excess vacation without limitation. However, the Port Authority had no obligation to pay an employee for the banked vacation unless and until the employee used the vacation or his or her employment ended. Specifically, the UETC Contract expressly stated that employees were "entitled to paid vacation leave which shall accrue on an *unlimited basis*." (55a; emphasis added) The HEO Contract expressly provided that "[e]very employee shall be entitled to receive the equivalent in cash for annual leave accrued *as of the date of resignation or separation from service for other reasons*." (14a; emphasis added) Thus, under the Labor Contracts, the Port Authority had the right to defer the cash liquidation of excess vacation until the date on which the employee's employment with the Port Authority was terminated — at which time the Port Authority was required to pay one day's pay for each day of banked vacation.

Effective July 6, 1989, the Decree was amended, *inter alia*, to increase the number of required vacation days from 15 to 17 per year. In addition, the following penalty provision was added:

> The Employer who does not grant any employee thereof the annual leave to which he/she is entitled after he/she has accrued it for two (2) years, must grant him/her the total accrued thus far, by *paying him/her two (2) times the corresponding salary for the period in excess of said two years*.

(51a; emphasis added)

---

[7](...continued)
entitled to enjoy their vacation leave in accordance with a program which is to be established by the Authority . . . ."); *see also* Stipulation of Facts (50a) ("The Port Authority has always paid excess accrued vacation leave in accordance with the Collective Bargaining Agreement.").

The Unions filed grievances challenging the Port Authority's practices regarding payment for accrued vacation, claiming that the employees were entitled to have the double penalty of the Decree applied to excess accrued vacation — including excess vacation days accrued and banked prior to July 6, 1989, the effective date of the penalty provision. (50a) The parties submitted the dispute to arbitration through the Conciliation and Arbitration Bureau of the Commonwealth of Puerto Rico Department of Labor and Human Resources.

On December 24, 1992, an arbitration award was issued — applying the penalty provision of the Decree to vacation accrued and banked under the Labor Contracts prior to July 6, 1989 and ordering the Port Authority to pay to all employees represented by the Unions three days' pay for each day of banked vacation in excess of the number of vacation days that could be accrued in two years under the applicable agreement. (6a)[8] In reaching his decision, the Arbitrator recognized that the public policy fostered by the penalty provision of the Decree "is to encourage that an employee not work over two years without taking a break for a well-deserved rest." (16a) Nonetheless, he applied the penalty even to those vacation days in excess of the statutory minimum that were accrued and banked at the election of the employees in accordance with the agreement of the parties.[9]

On January 25, 1993, the Port Authority filed a timely complaint in the Superior Court of Puerto Rico challenging, *inter*

---

[8] Two days' pay for each accrued and banked vacation day represents the penalty imposed by the Decree itself. An additional day's pay for each accrued and banked vacation day was imposed by application of Law No. 96 of 1956 as amended. *See* 22a & n.19 and n.14, below.

[9] The record is devoid of evidence that any employee of the Port Authority was ever prevented from taking, or allowed to bank, the minimum vacation days required by the Decree.

alia, that part of the arbitration award that imposed the double pay penalty of the Decree with respect to vacation days accrued prior to July 6, 1989, the effective date of the penalty. By judgment entered on June 8, 1993, the Superior Court rejected the Port Authority's challenge — explaining its reasoning in a mere four paragraphs.

The Superior Court summarily rejected the Port Authority's argument that the penalty should not be applied to unused vacation days accrued and banked prior to July 6, 1989. With minimal discussion, the court concluded that the arbitration award was "consonant with and in support of public policy that no employee should be kept from taking his annual leave for over two years." (4a) It did so despite the absence of any evidence — let alone a finding — that any Port Authority employee had been "kept from taking his annual leave" for any period of time.

On July 12, 1993, the Port Authority filed with the Supreme Court of Puerto Rico a timely petition for discretionary review of the judgment of the Superior Court. On September 10, 1993, the Supreme Court of Puerto Rico denied the petition for review. In its explanation of the reasons for the denial of review,[10] the Supreme Court of Puerto Rico acknowledged "the retroactive application of the penalty imposed in this case," but concluded that it was necessary to foster the "public policy . . . that no employee works more than two years without enjoying his vacations." (25a)

On September 27, 1993, the Port Authority filed with the Supreme Court of Puerto Rico a timely Motion for Reconsideration of its denial of review. Its first argument on the Motion for Reconsideration was that the penalty provision of the Decree, as construed below, violated Article I, Section 10, of the United States

---

[10] The Supreme Court of Puerto Rico is required by statute to state the reasons for a denial of discretionary review. *See* Law No. 11 of June 2, 1993.

Constitution and Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico.[11] (35a) By decision entered on January 28, 1994, the Supreme Court denied the Motion for Reconsideration.

On February 4, 1994, the Port Authority filed with the Supreme Court of Puerto Rico a timely Second Motion for Reconsideration of the court's denial of review.[12] Again, the Port Authority urged that the penalty provision of the Decree, to the extent that it was retroactively applied in this case, violated Article I, Section 10, of the United States Constitution. (40a) By decision entered on March 1, 1994, the Supreme Court of Puerto Rico denied the Second Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

The new penalty provision of Mandatory Decree No. 38 requires the Port Authority to pay to all employees represented by the Unions double pay for every day of vacation accrued prior to July 6, 1989 in excess of the number of days that would be accrued under the Labor Contracts in two years[13] and to do so immediately rather than upon the termination of their employment. This is so

---

[11] Under Puerto Rican law, a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below. *See, e.g., Sanchez v. Eastern Air Lines, Inc.*, 114 P.R.R. 691, 694-95 (1983); *Lopez v. Hospital Presbiteriano, Inc.*, 107 P.R.R. 197, 227 (1978); *Santiago Cruz v. Hernández Andino*, 92 P.R.R. 709, 711-12 (1965); *Dávila v. Valdejully*, 84 P.R.R. 101, 104 (1961); *Piovanetti v. Vivaldi*, 80 P.R.R. 108, 121-22 (1957).

[12] Rule 45(c) of the Rules of the Supreme Court of Puerto Rico allows a party to file a second motion for reconsideration as of right prior to the issuance of the mandate. P.R. Laws Ann. tit. 4, Appendix IA.

[13] This would be 60 days in the case of HEO and 54 days in the case of the UETC.

despite the fact that the vacation had accrued and been banked by employees *before* the penalty provision was added to the Decree and at a time when the Port Authority was entitled — indeed obligated by the Labor Contracts — to permit the banking of excess vacation without limitation. The penalty imposed by the Decree, moreover, is doubled by operation of Law No. 96 of 1956 as amended.[14]

The effect of the retroactive penalty provision of the Decree, therefore, is to require the Port Authority to pay its employees *three days' pay* for each day of vacation over 60 days (or, in the case of the UETC, 54 days) that the employee elected to bank before the effective date of the penalty. It is this application of an ex post facto law to punish the Port Authority for conduct that predated the enactment of the law, and to impair dramatically its rights under the Labor Contracts, that the Port Authority asks this Court to grant certiorari to correct.

The Judgment Below Is In Conflict With The Decisions Of This Court Construing And Applying The Contract Clause And The Ex Post Facto Clause Of Article I, Section 10.

As this Court recently explained, the Constitution and the decisional law interpreting it, evidence a strong presumption against retroactive legislation and the Contract and Ex Post Facto Clauses are among the constitutional provisions that express this "antiretroactivity principle." *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *39 (Apr. 26, 1994). This presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at *37 & n.17. It expresses the belief "that individuals should have an

---

[14] P.R. Laws Ann. tit. 29, § 246b(a) (an employee who receives less vacation leave than he or she is entitled to receive pursuant to a collective bargaining agreement is entitled to compensation for the leave "plus an amount equal to the unpaid amount as additional compensation").

opportunity to know what the law is and to conform their conduct accordingly." *Id.* at *37-38. In addition, the concept of fairness is undermined by retroactive legislation, much more so than purely prospective legislation, "because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992).

The penalty provision of Mandatory Decree No. 38, as applied to the Port Authority, suffers from the precise flaws that this Court's teachings in the realm of retroactive legislation seek to prevent. *Landgraf*, 1994 U.S. LEXIS 3292, at *49 ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").[15] Specifically, the penalty embodies the primary unfairness that underlies the presumption against retroactive legislation, namely "imposing new burdens on persons after the fact." *Landgraf*, 1994 U.S. LEXIS 3292, at *48.

Inexplicably, the Superior Court concluded that application of the penalty at issue here to vacation days accrued and banked prior to July 6, 1989 "does not constitute a retroactive application of the Decree." (4a) The Supreme Court of Puerto Rico correctly rejected that conclusion, observing that "the *retroactive* application of the penalty imposed in this case in the Mandatory Decree must be assessed in the light of the public policy it implemented." (25a; emphasis added) As this Court has made clear, "'every statute, which . . . creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed to be retrospective . . . .'" *Landgraf*, 1994 U.S. LEXIS 3292, at *43-44 (quoting *Society for*

---

[15] This presumption is not limited to purely private parties; even the government is entitled to be free from the retroactive imposition of "new monetary obligations." *Id.* at *49 n.25 (and cases cited therein).

Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (No. 13,156) (CCDNH 1814) (Story, J.)); *see also id.* at *44-45 n.23 ("'A law is retrospective if it "changes the legal consequences of acts completed before its effective date"'"; "retroactive statute gives 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed'") (citations omitted)).

In determining whether a particular statute operates "retrospectively" the inquiry should focus on "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at *45. Factors to be evaluated include the "familiar considerations of fair notice, reasonable reliance and settled expectations." *Id.* at *46-47. As discussed more fully below, the application of the penalty provision of the Decree to the Port Authority fails on all three counts.

The penalty as applied to employers like the Port Authority disturbed their "settled expectations" regarding the obligations they had to their employees as to how much — and when — they had to pay for accrued and banked vacation leave. The Port Authority's reliance on the fixed scope of this obligation as set forth in the Labor Contracts was certainly reasonable, as the law in effect at the time permitted such arrangements. Further, the Decree as modified provided no notice to the Port Authority that its prior practices pursuant to the Labor Contracts would be subject to harsh penalties, nor any grace period in which to alter them accordingly.

In any event, regardless how the penalty provision is characterized, its effects remain the same. It impaired the Labor Contracts between the Port Authority and the Unions and it imposed a harsh monetary penalty — effectively punishing the Port Authority for past conduct permitted by law and required by the Labor Contracts.

A. The Retroactive Penalty, as Applied to the Port Authority, Substantially Impaired Preexisting Contracts Between the Port Authority and the Unions and Is Neither a Reasonable Nor Necessary Means of Promoting the Articulated Public Purpose of the Decree.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. In order to determine whether a state law has violated that prohibition, this Court has invoked a three-part test. First, the state law must have "in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). Second, if the law is found to work such an impairment, the inquiry next addresses whether the impairment "serve[s] a legitimate public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). The final step of the inquiry asks whether the impairment "is reasonable and necessary" to serve the articulated public purpose. *Id.* at 25.

As shown below, the retroactive penalty imposed by the Decree substantially impaired the Port Authority's obligations under the Labor Contracts and was neither reasonable nor necessary to achieve the articulated public purpose of the Decree.

1. The Substantial Impairment of the Labor Contracts

As this Court has recognized, the purpose of a contract is to "enable individuals to order their . . . business affairs according to their particular needs and interests." *Allied*, 438 U.S. at 245. Having done so, a party is entitled to rely on the "rights and obligations" set forth in the contract. *Id.* This purpose is frustrated where, as here, subsequently enacted state legislation thwarts the reasonable expectations arising out of a party's contractual arrangements.[16]

---

[16] The framers of the Constitution, in the Contract Clause, recognized "the necessity and policy of giving permanence and security to (continued...)

As explained above, the Labor Contracts in effect when the penalty provision was added to the Decree governed, *inter alia*, the amount of vacation to which covered employees were entitled and the manner in which they could accrue or "bank" any unused vacation. Each provided for vacation well in excess of the minimum required by law. In addition, under the Labor Contracts, employees were entitled to accrue or "bank" certain vacation in excess of that required by law and either to use the banked vacation at a later date or to be paid in cash for it upon the termination of their employment with the Port Authority.[17] At the time the parties entered into the Labor Contracts, the law permitted such an arrangement governing the terms and conditions of vacation leave in excess of the statutory minimum. *See* pages 16-17, and n.19, *infra*.

---

[16](...continued)
contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 648 (1819).

[17] In this regard, it was uncontroverted below that the established practices between the parties under both the HEO and the UETC Labor Contracts were the same. While the UETC contract did not contain an explicit provision for the liquidation of accrued vacation upon separation from employment, this Court has long recognized that collective bargaining agreements are to be interpreted in light of the established practices between the parties. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989) ("[I]t is well established that the parties' 'practice, usage and custom' is of significance in interpreting their [collective bargaining] agreement."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 580-81 (1960) (gaps in a collective bargaining agreement are to be filled with "reference to the practices of the particular industry and the various shops covered by the agreement").

When the Decree was amended in 1989 to require the payment of two days' pay for every vacation day accrued in excess of the number of vacation days earned in two years, the obligation that the Port Authority had to its employees under the Labor Contracts was radically altered. Given the applicability of Law No. 96 (*see* n.14, *supra*), the Decree has in effect superimposed on the Port Authority's obligations under the Labor Contracts a requirement that the Port Authority pay *three times* the amount that it — and the Unions — had agreed would be paid for vacation days that employees elected to bank. Under this Court's decisions, as well as lower court authority applying them, such interference with the parties' contractual obligations clearly constitutes an impairment of constitutional dimensions. *See Allied*, 438 U.S. at 246 n.18 (substantial impairment where state law "compelled the employer to exceed bargained-for expectations"); *see also McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 606 (S.D. Iowa 1993) (challenged regulation worked a substantial impairment because it "change[d] the rights to which the parties agreed and for which they gave consideration"); *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537, 1549 (N.D. Cal. 1991) (obligations under collective bargaining agreements were substantially impaired where agreed upon wages would in some cases be nearly doubled).

Particularly apposite is this Court's decision in *Allied*. There, an Illinois employer with an office in Minnesota had adopted a pension plan for all its employees in accordance with the applicable law at the time. 438 U.S. at 236. Under the terms of the plan, employees who reached the age of 65, as well as certain other employees who met specific length-of-service requirements, were entitled to receive a pension calculated as a percentage of their then current salary, multiplied by years of service. *Id.* at 236-37. Allied specifically reserved the right to determine the amount of contributions to be made to the plan, if any, "to amend the plan in

whole or in part [and] to terminate the plan and distribute the trust assets at any time and for any reason." *Id.* at 237.

Ten years after Allied adopted its plan, the Minnesota legislature enacted the Private Pension Benefits Protection Act in April 1974 (the "Minnesota Act"). *Id.* at 238. Under the Minnesota Act, any employer that terminated a pension plan or closed an office in Minnesota was required to pay a "pension funding charge," that was "assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years." *Id.* Moreover, years of service prior to 1974 were to be counted toward the ten year minimum. *Id.* at 238-39.

When Allied began closing its Minnesota office shortly after the Minnesota Act became effective, it discharged eleven of the thirty employees in that office. *Id.* at 239. Nine of those eleven employees had worked for Allied for more than ten years, but were not vested under the terms of Allied's pension plans. *Id.* Nonetheless, Allied was assessed a $185,000 pension funding charge for those employees under the recently enacted statute. *Id.*

Allied challenged the constitutionality of the Minnesota Act on the ground that it "impaired its contractual obligations to its employees under its pension agreement." *Id.* at 240. This Court reversed the decision of a three-judge court, which had upheld the constitutionality of the act, finding that the Minnesota Act, as applied to Allied, violated the Contract Clause of the Constitution. *Id.* at 251. In so doing, the Court began by noting that the Minnesota Act unquestionably impacted "upon the company's contractual relationships with its employees. . . . [and] substantially altered those relationships by superimposing pension obligations upon the company *conspicuously beyond those that it had voluntarily agreed to undertake*." *Id.* at 240 (emphasis added).

In concluding that this imposition constituted a substantial impairment of Allied's contract with its employees the Court found that, under the terms of the pension plan as Allied had adopted it,

Allied "had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan." *Id.* at 245-46. The Court also found that Allied reasonably had relied on this "legitimate contractual expectation" when it determined its annual plan contributions. *Id.* at 246. According to the Court,

> The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.

Id.

Like the statute challenged in *Allied*, the penalty provision of the Decree, as applied here, "nullifies express terms of the [Port Authority's] contractual obligations and imposes a completely unexpected liability in potentially disabling amounts." *Id.* at 247. Specifically, it effectively nullifies (i) those portions of the Labor Contracts that permitted employees to bank accrued vacation days in excess of those required by law and (ii) the payout provisions of the Labor Contracts — which defer any liquidation of banked vacation days until the date of separation from employment and require the payment of one day's pay (not two or three) for each day of banked vacation.

Equally important, in light of the parties' long-standing contractual arrangements and the law in effect before the 1989 revision of the Decree, the retroactive penalty was unexpected. Prior to July 6, 1989, it was clear that at least with respect to

vacation in excess of that required by law,[18] employers and unions were free to determine through collective bargaining how the excess vacation would be accrued, enjoyed and liquidated. As the Solicitor of the Commonwealth of Puerto Rico Department of Labor and Human Resources stated in a 1984 opinion,

> The parties have the power to determine the form and manner of using [vacation] days in excess of those established by mandatory decrees.

Consultation No. 12400 of the Solicitor of Labor, dated July 13, 1984 (48a).[19] Accordingly, like Allied, the Port Authority had "no reason to anticipate" the radical alteration in the terms of the Labor Contracts that the Decree imposed in July 1989.[20]

---

[18] The record is devoid of evidence that any employee of the Port Authority was ever prevented from taking, or allowed to bank, the minimum vacation days required by the Decree.

[19] In an opinion released after the 1989 revision to the Decree, the Secretary of Labor of the Commonwealth of Puerto Rico reaffirmed this rule and its applicability to the decrees:

> There is nothing in the law nor in the decrees which prevents an employer from granting vacation . . . leave on top of that which is provided by the applicable decree. In these cases, the employer is the one who shall establish the criteria for the accrual, enjoyment and payment, without, clearly, having to comply with the criteria of the decree therefor. In fact, it could establish different, lesser or greater criteria for their accrual, enjoyment and payment than those in the decree.

Opinion 91-4 of the Secretary of Labor, dated November 1, 1991 (45a).

[20] Furthermore, it is well established under Puerto Rican law that no penalty may be imposed in the absence of an express statutory provision establishing the penalty. A penalty may not be presumed

(continued...)

Thus, the retroactive imposition of a penalty with respect to vacation accrued and banked prior to July 6, 1989 — when the Port Authority was permitted by law, and obligated by the Labor Contracts, to allow such accrual — was a "completely unexpected liability" within the meaning of this Court's decision in *Allied*. *See also Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (holding unconstitutional a state requirement that nursing home refund monies paid under rate schedule that was not unlawful when monies were paid), *cert. denied*, 469 U.S. 1215 (1985). And, given the applicability of Law No. 96 — which increases an already double penalty — the Authority now faces the prospect of paying *three times* the amount it agreed to pay its covered employees under the Labor Contracts for accrued vacation.

This new obligation — which will amount to literally millions of dollars in the aggregate — is truly a liability of "potentially disabling amounts." *Allied*, 438 U.S. at 247. Such a "[s]evere impairment," this Court has held, "will push the [constitutional] inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* at 245.

---

[20](...continued)

based merely on the presence of a statutory or regulatory prohibition; it must appear in the statute itself. *Puerto Rico Labor Relations Board v. Ventanas Yagüez, Inc.*, 103 P.R.R. 1308 (1975) ("[P]enalties cannot be presumed and . . . their imposition is justified only when the law expressly provides it."); *Torres v. Hull Dobbs of Puerto Rico, Inc.*, 103 P.R.R. 662 (1975) (same); *Pamblanco v. Union Carbide Caribe, Inc.*, 90 P.R.R. 693 (1964). Therefore, even if the provisions of the Decree had been construed prior to July 6, 1989 to apply to vacation in excess of that required by law, there was no penalty for noncompliance and none could be presumed.

2. The Lack of a Reasonable and Necessary Relationship Between the Retroactive Penalty and Its Articulated Public Purpose

The public purpose behind the 1989 revision of the Decree, as articulated below, was to remedy the problem of employers who did not permit their employees to take vacation leave. *See* Appendix C at 25a (public policy fostered by the Decree is "that no employee works more than two years without enjoying his vacations"); Appendix A at 4a (penalty is "in support of public policy that no employee should be kept from taking his annual leave for over two years"); Appendix B at 20a (public policy set forth in the Decree "is that of encouraging the employee to take, as a matter of fact, his annual leave, and that in no case may he work for over two years without taking it").

Nonetheless, as the Decree was construed below, there were at least two categories of employers affected by the penalty provision: (i) those who in fact did not allow their employees to take vacation for over two years and (ii) those who, in the context of collective bargaining, had agreed to provide more vacation than mandated by the Decree and to permit their employees to elect to bank (for later use or liquidation in cash) vacation days in excess of the minimum required by the Decree. The Port Authority falls in the latter category.

As applied to the Port Authority (and other employers in the latter category), the penalty provision clearly does not serve the purpose for which it was enacted. This is so because the record is devoid of evidence that any employee of the Port Authority has been prevented from taking vacation for over two years or has been permitted to bank (rather than use) the minimum number of vacation days mandated by the Decree. Thus, no matter how valid the animating purpose of the penalty provision in the abstract, that purpose cannot be relied upon to justify impairment of the Port Authority's obligations under the Labor Contracts.

To the contrary, as applied here, the penalty provision of the Decree has the effect (if not the aim) of punishing employers like the Port Authority that voluntarily agreed to vacation arrangements more generous than those required by law. In analogous circumstances, this Court struck down the Minnesota Act in *Allied*, emphasizing that the Act imposed on Allied "obligations . . . conspicuously beyond those that it had voluntarily agreed to undertake." 438 U.S. at 240. Indeed, the Court observed,

> [The Minnesota Act] was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

Id. at 250.

Here, moreover, the penalty provision of the Decree was not even aimed at employers like the Port Authority.[21] Rather, the Port Authority (and other employers who have agreed to similar vacation arrangements) are the unfortunate victims of an overbroad penalty provision that penalized them as well as employers that had been thwarting the public policy that the Decree sought to further. Thus, no legitimate public purpose is served by imposing retroactive penalties on the Port Authority for agreeing to provide its employees with vacation benefits superior to those required by law.

In fact, it is precisely the retroactive application of the penalty to employers like the Port Authority that robs the Decree of

---

[21] The retroactive aspect of the Decree is arguably unconstitutional even as applied to employers that did prevent their employees from taking vacation for over two years. Because the Port Authority did not prevent its employees from taking vacation, however, the Court need not reach this issue to reverse the judgment below.

its otherwise legitimate public purpose. Indeed, that retroactive application of the penalty eliminates any rationale for the deference that might otherwise be due the legislative judgment reflected in the Decree. *Compare Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 418 (1983) (finding that means chosen by state legislature to implement public purpose were not deficient, "particularly in light of the deference to which the . . . Legislature's judgment is entitled") *with Allied*, 438 U.S. at 247 ("The presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' simply cannot stand in this case."). Thus, this Court can and should, as it did in *Allied*, undertake its own analysis of whether the retroactive application of the penalty "was necessary to meet an important general social problem." 438 U.S. at 247.

A state law that is valid prospectively may nonetheless be unconstitutional to the extent that it has retroactive application.[22] Accordingly, the retroactive aspects of a state law must be examined separately from the prospective aspects, or from the

---

[22] *See, e.g., Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir.) (retroactive elimination of the "borrowed employee" doctrine from workers compensation statute, subjecting company to liability in pending cases where there previously was none, unconstitutionally impaired implied contract of employment between company and borrowed employees), *cert. denied*, 484 U.S. 963 (1987); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442 (8th Cir. 1984) (state statute violated Contract Clause to the extent that it required nursing homes to refund to residents amounts paid before enactment of new statute that were in excess of rates permitted by the new statute), *cert. denied*, 469 U.S. 1215 (1985); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (application of statute prohibiting termination of insurance agency agreements except for enumerated reasons was unconstitutional as applied to agreements entered into before enactment of statute).

statutory scheme as a whole, in order to determine if they pass constitutional muster. As the *Nieves* court stated:

> In a due process context . . . "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." . . . The same point is apt when considering the rationality of retroactive application of a statute for purposes of the Contract Clause.

819 F.2d at 1249 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)); *see also Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *39 (quoting *Usery*, for the same proposition); *Garris*, 630 F.2d at 1008 ("a public purpose that might clearly undergird a general exercise of police power will not necessarily protect all its parts from Contract Clause limitations on that power") (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

Here, there has been no showing — nor could there be — that the retroactive application of the penalty provision of the Decree to vacation accrued and banked before July 6, 1989 was a reasonable means of ensuring "that no employee should be kept from taking his annual leave for over two years." (4a) To the contrary, imposing a penalty of three days' pay for every day of vacation in excess of 60 banked prior to July 6, 1989 — with no transitional or grace period — effectively precluded the Port Authority and other employers from requiring their employees to use the excess vacation in order to avoid the penalty. *See Allied*, 438 U.S. at 247 (criticizing the challenged statute for forcing the company "to make all the retroactive changes in its contractual obligations at one time"). Using vacation, rather than receiving money in its stead, is supposed to be the purpose that the Decree should serve. As applied to the Port Authority, however, the retroactive penalty would punish it for complying with the terms of

its Labor Contracts and would result in windfall payments for employees. It would not foster the stated purpose of the Decree — *i.e.*, ensuring that no employee works for more than two years without taking vacation.

In these circumstances, the enormous penalties imposed on the Port Authority by retroactive application of the Decree constitute an unconstitutional impairment of its obligations under the Labor Contracts. Accordingly, for that reason alone, the petition for writ of certiorari should be granted and the judgment below should be reversed.

B. The Retroactive Penalty, as Applied to the Port Authority, Violates the Constitutional Prohibition Against Ex Post Facto Laws.

Because of the particular nature — and magnitude — of the penalties imposed, the retroactive penalty provision of the Decree also violates the Ex Post Facto Clause of the Constitution. That clause provides: "No State shall . . . pass any . . . ex post facto Law." U.S. Const., art. I, § 10, cl. 1. "The mark of an ex post facto law," this Court has held, "is the imposition of what can fairly be designated punishment for past acts." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). A particular statute imposes punishment when it "serves the twin aims of retribution and deterrence." *United States v. Halper*, 490 U.S. 435, 448 (1989); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976) ("[W]e would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness.") (citations omitted).

In its recent decision rejecting the retroactive application of the damages provisions of the Civil Rights Act of 1991, this Court discussed whether it would be appropriate to apply retroactively a newly-created punitive damages provision. *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *69 (Apr. 26, 1994). In its analysis, the Court recognized that "[t]he very labels

given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Id.* Accordingly, the Court determined that imposing such damages retroactively "would raise a serious constitutional [ex post facto clause] question." *Id.* (citing *Usery*, 428 U.S. at 17, *De Veau v. Braisted*, 363 U.S. at 160 and *Louis Vuitton S. A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985) ("retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 'would present a potential ex post facto problem'")).[23]

The retroactive penalty provisions at issue here suffer from the very constitutional infirmity identified by this Court in *Landgraf*.[24] Plainly, the penalty serves no purpose but to punish the Port Authority, and other similarly situated employers, for past conduct — conduct that was permitted when the employees elected to bank the excess vacation days upon which the retroactive portion of the penalty has been calculated. Thus, the "twin aims of

---

[23] There was no need to reach the Ex Post Facto Clause issue in *Landgraf* because the Court concluded that the punitive damages provision of the Civil Rights Act of 1991 applies only prospectively.

[24] In fact, the penalty currently facing the Port Authority is far worse than the punitive damages that the Civil Rights Act of 1991 introduced, where the maximum exposure is capped at graduated levels based on the number of persons employed by a particular employer and cannot exceed $300,000. *Landgraf*, 1994 U.S. LEXIS 3292, at *68.

Here, in contrast, the retroactive penalties imposed on the Port Authority by the decision below are estimated to be at least 2.2 million dollars. (*See* Affidavit of Miguel E. Hernandez Jimenez, ¶2, dated May 20, 1994, attached to the Port Authority's Application for Recall of Mandate and Stay of Execution and Enforcement of Judgment Pending Filing of Petition for Writ of Certiorari.)

retribution and deterrence" (*see United States v. Halper*, 490 U.S. at 448) clearly are at play here.

First, by requiring employers to pay triple for accrued but unused vacation days, the Decree does not merely compensate the employees for the unused days, but provides them with a windfall. (*See* n.24, *supra*.) The windfall is even more obvious, and the penalty more onerous, in the instant case because the employees themselves chose to bank their excess vacation days for later use or reimbursement and now will receive a bonus for having done so. Plainly, the penalty is not merely remedial in its aim, but singles out employers like the Port Authority — penalizing them for their past practices.

Second, as expressly acknowledged below, the addition of the penalty provision in 1989 was specifically designed to deter employers from not complying with the Decree. *See* Appendix A at 3a (the penalty "*seeks to prevent*" employers from keeping employees from taking vacation for more than two years) (emphasis added); and Appendix B at 20a ("What the 8th Review does is to provide the double pay that the Decree did not have, *precisely to oblige the Employer to give his employees annual leave.*") (emphasis added). Indeed, even the Unions apparently recognized the punitive nature of the penalty. *See* Appendix B at 18a (noting with apparent approval the Union's argument that "the Decree . . . *directly penalizes* the Employer for having accrued [vacation] for over two years") (emphasis added). While the penalty thus "can be expected to give . . . added incentive," for employers to comply with the Decree, "that purpose is not served by applying the regime to preenactment conduct." *Landgraf*, 1994 U.S. LEXIS 3292, at *71 n.35.

This is especially true for employers like the Port Authority, who did comply with the Decree and in fact provided more vacation for their employees than was legally required. As to them, this retroactive penalty provision is punishment, pure and simple,

imposed as a result of past conduct. It is precisely the type of state legislation that the Ex Post Facto Clause proscribes. Accordingly, for this reason as well, the petition for writ of certiorari should be granted and the judgment below should be reversed.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CAROLE O'BLENES
DANIEL R. DOMINGUEZ

Attorneys for Petitioner

SAUL G. KRAMER
WENDY L. KORNREICH

Of Counsel

May 27, 1994

Appendix A — Judgment of the Superior Court of Puerto Rico

(Translation)

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN DIVISION

PUERTO RICO PORT AUTHORITY DEFENDANT — APPELLANT VS. HERMANDAD DE EMPLEADOS DE OFICINA COMERCIO Y RAMAS ANEXAS (HEO) (BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND AFFILIATED BRANCHES) AND UNION DE EMPLEADOS DE TRANSPORTE DE CATAÑO (UETC) (CATAÑO TRANSPORTATION WORKERS UNION) PLAINTIFFS — APPELLEES	CIVIL NO.: KAC 93-0116 (901) RE: JUDICIAL REVIEW OF LABOR-MANAGEMENT ARBITRATION AWARD (HON. PEDRO SANTOS, ARBITRATOR; CONCILIATION AND ARBITRATION BUREAU OF THE LABOR DEPT.)

JUDGMENT

The complaint of the Puerto Rico Port Authority is denied, challenging that part of a labor-management arbitration award that decided that the penalty of double pay for the days of annual leave accrued in excess of the maximum days authorized to be accrued, as provided by Mandatory Decree No. 38 of 1989 (8th Review) with effect from July 6, 1989, applies also to the annual leave already accrued up to that date and not merely to the annual leave to be accrued after that date, as sustained by the Authority.

— — — OOO — — —

Mandatory Decree No. 38, applicable to the Transportation Industry in its sixth review of 1974 and seventh of 1983, provided in an identical manner regarding the right to annual leave: one and one fourth (1 1/4) days per month, which, according to a written agreement between employer and employee, may be accrued for over a year but never for more than two. Nothing was provided in the event that the employer did not grant his employees the annual leave that they were entitled to after having accrued the maximum for the two years. The eighth review of the Decree, effective July 6, 1989, introduced changes in the section regarding annual leave by providing them at the rate of one and five twelfths (1 5/12) of a working day per month (17 working days per year). It provided, as before, that they could be accrued for over a year but never for more than two, and added the following:

> The employer who does not grant any of his employees the annual leave to which they are entitled after having accrued them for two (2) years, shall grant them the total amount accrued up to that time, paying them two (2) times the corresponding salary for the period in excess of said two years.

When the controversy between the parties arose, it was submitted, along with others, to an arbitrator. Concerning this section regarding the effective date of the double pay, the Authority alleged that its obligation to pay double for the excess annual leave begins in August, 1991, two years after the effectiveness of the Decree reviewed on July 6, 1989, since it was after it was in force that the annual leave began to be credited and to count, with the maximum limit of accumulative days being in August, 1991 and it was over that limit accrued during the effectiveness of the 8th review of the Decree, that double pay was given. The Union, on the other hand, alleged that the 8th review of the Decree refers to the annual leave that at *that* moment the employee would have been

entitled to after having already accrued it and not only to those days that were going to be accrued as of that date.

Based on the hermeneutic principles stated in *Díaz vs. Secretary of the Treasury*, 116 DPR 865, the Arbitrator resolved correctly, according to our belief, that the Decree referred to the annual leave accrued up to that moment since, if an employer had kept an employee up to then for more than two years without giving him his annual leave after the maximum accumulative time, he was in violation of public policy, and that is what the penalty of double pay after the maximum two-year accumulative time, seeks to prevent.

The Authority alleges before us that the Arbitrator erred in retroactively extending the provisions of the Decree, modifying or amending it, when applying the penalty of this 8th review of the Decree or the accrued annual leave under the previous review of the Decree. We understand and resolve that the Authority is not right.

During all the previous reviews of the Decree, it was permitted to accrue annual leave up to the maximum number of days corresponding to what was earned during two years. That did not vary in the new review, neither did the rule that the worker was entitled to go on annual leave. What the 8th review provided was that, as of that time, July 6, 1989, the days accrued exceeding that limit would not be lost when, and in the cases where, contrary to public policy, the employer did not grant his employees annual leave when they reached the maximum limit of accrued days. When the maximum limit of days of annual leave accrued were exceeded on July 6, 1989, or after that date, by days of annual leave earned, some before and others after that date, the penalty of twice the salary would be paid for the period corresponding to the excess of the maximum limit of two years provided in the 8th review, *in addition* to granting the total amount of days of annual leave accrued up to that time during which he would receive regular pay. To use the days accrued under the effectiveness of the

previous review to set and fill a maximum limit of accumulative days after which the penalty would be paid prospectively, does not constitute a retroactive application of the Decree.

We appreciate the fact that the Arbitrator acted correctly when he rejected, by implication, that it would be necessary to wait for the prospective and maximum accrual of annual leave for two years, ignoring the days accrued previously, in order to then apply the penalty of double pay. Furthermore, we appreciate that his actions were consonant with and in support of public policy that no employee should be kept from taking his annual leave for over two years.

The Authority also challenges that the Arbitrator had retained jurisdiction in order to later determine attorney fees. These, the attorney fees, are actually related to the two principal controversies adjudicated in the award, for the determination of which I have been challenged in this appeal by the Authority. Those controversies deal with the interrelation between Mandatory Decree No. 38 and the Collective Bargaining Agreement in force between the parties in their provisions regarding the liquidation of sick leave and annual leave. The Arbitrator ordered the manner in which the excess days accrued for these leaves would be liquidated, and regarding the request for fees pertaining to the labor party, it ordered that it would be provided after the Employer informs the total amount of wages involved. Since the total amount earned or to be earned is an important element in determining the amount to be fixed for attorney fees, the arbitrator acted correctly. That information would help him to be fair.

The filing of this case is ordered.
TO BE ENTERED AND NOTIFIED.
Issued in San Juan, Puerto Rico, on June 8, 1993.

(Signed)
FLAVIO E. CUMPIANO
JUDGE

I CERTIFY: JUNE 10, 1993
Paulita Santiago Cartagena
General Clerk
By: (Illegible signature)
Deputy Clerk

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix B — Arbitration Award

(Translation)

Commonwealth of Puerto Rico
DEPARTMENT OF LABOR AND HUMAN RESOURCES
CONCILIATION AND ARBITRATION BUREAU
505 Muñoz Rivera Ave.
Hato Rey, P.R. 00918

PORT AUTHORITY OF PUERTO RICO (Employer)	:	ARBITRATION AWARD
And	:	RE: PAYMENT OF THE EXCESS ACCRUED FOR SICK LEAVE AND ANNUAL LEAVE - DECREE NO. 38 AND THE COLLECTIVE BARGAINING AGREEMENT
BROTHERHOOD OF OFFICE WORKERS AND AFFILIATED BRANCHES OF PUERTO RICO AND CATAÑO TRANSPORTATION WORKERS UNION (Unions)	:	CASES NO.: A-1635 A-1893
	:	ARBITRATOR:
	:	PEDRO SANTOS

I - MATTERS TO BE RESOLVED

In the instant complaint, the parties agreed to submit the matters to be resolved by means of stipulations of facts, documents and simultaneous allegations regarding the controversy.[1] The

[1] The Puerto Rico Port Authority was represented before the Arbitrator by Atty. Francisco L. Acevedo. The Brotherhood of Office Workers and Affiliated Branches (HEO), by Atty. José E. Carreras Rovira and (continued...)

complaint deals with the payment of excess sick leave and annual leave. Thus, the parties have asked the Arbitrator to resolve "whether or not the Authority (the Employeer) has paid correctly the excess sick leave and annual leave (vacations), in the light of the facts and documents stipulated, the Collective Bargaining Agreement, the Jurisprudence and applicable mandatory decrees. If the Authority has not paid correctly, the Arbitrator is to determine the appropriate remedy."[2]

II - SICK LEAVE

A. Applicable Provisions of the Collective Bargaining Agreement:

> Article XXIV, Sec. 1
>
> "Section 1: *The employees covered by this Agreement shall be entitled to accrue twenty (20) work days a year* for sick leave, and shall have the right to go on leave be it due to illness of the employee himself or due to a contagious disease in the family."
>
> ...
>
> "Section 7: a) *The Authority shall pay one hundred per cent (100%) of the sick leave accrued in excess of the six*

---

[1](...continued)
the Cataño Transportation Workers Union (UETC), by Atty. Norman Pietri. Since the UETC had a complaint before the NCA (Negociado de Conciliacion y Arbitraje-Conciliation and Arbitration Bureau) regarding the same matter (Case A-1893), the three parties, for reasons of procedural economy, agreed that both cases be seen jointly, the UETC and the HEO uniting vis a vis the Employer.

[2] See Submission Agreement. It is proper to clarify that in joining the case, the Cataño Transportation Workers Union is only claiming the part corresponding to annual leave, it is not making any claim whatsoever regarding sick leave.

hundred and fifty (650) hours, as of January 31, 1991, and so on, up to the effective date of this Agreement and it shall be paid on or before March 31, 1991, and so on. (Emphasis added)

b) *The Authority shall pay one hundred per cent (100%) of the sick leave in excess of the four hundred and fifty (450) hours (if this action is selected)*, informing it to the Personnel Office, in writing, by November 30, 1990, by January 31, 1991, and so on, up to the effective date of this Agreement, and it shall be paid on or before March 31, 1991 and so on. (Emphasis added)

c) In the event that an employee chooses to keep the excess of the six hundred and fifty (650) hours by January 31, 1992, he may inform it in writing to the Personnel Office by November 30, 1991 to make the permanent change."

...

"Section 13: The Authority shall pay a lump sum at the regular wage rate that an employee may earn for sick leave not used, to any employee covered by this Agreement who separates from service permanently or temporarily due to retirement, age or disability."

B. Applicable Provisions of Mandatory Decree No. 38 (8th Review — 1989)

Article VII — Sick Leave

"*Every employee shall be entitled to sick leave, with full pay, at the rate of 1 1/12 days (13 days a year) for each month that he has worked at least one hundred (100) hours*. Sick leave not used by the employee during the course of the year, shall be accrued for the following years. If the accrued days of sick leave were to exceed twenty-six (26) days by November 30th of any year, the employer shall be

obliged to pay in cash, the period exceeding said twenty-six (26) days, at the rate of eight hours a day at the rate per regular hour that the employee may be receiving on that date. The payment for the excess of twenty-six (26) days, shall be made by not later than the 15th of the following month..." (Emphasis added).

III. PAYMENT OF THE EXCESS SICK LEAVE ACCRUED — ANALYSIS AND CONCLUSIONS

We have seen what the Collective Bargaining Agreement provides, as well as the applicable Decree, regarding the payment of the excess sick leave accrued. The Collective Bargaining Agreement (Art. XXIV Sec 7 (a) supra), provides the payment of 100% of the excess sick leave accrued over 650 hours (81.25 days),[3] while Decree No. 38 provides the payment of this type of leave in excess of 26 days. Furthermore, we have seen that the Collective Bargaining Agreement has an ample advantage over the Decree regarding the number of days of sick leave that it grants the employee. The Agreement grants 20 days a year while the Decree only grants 13 days.

The Employer, for years, has been paying the excess sick leave, taking into consideration both the Collective Bargaining Agreement as well as Decree No. 38.[4] Thus, for example, when an employee has accrued in three years, sixty (60) days of sick leave under the Agreement, the Employer assumes that 39 of those days were accrued under the Decree (13 days per year) and the rest up to sixty, were accrued under the Agreement. Then he pays under the Decree, 13 days (the difference between 26 and 39). He pays the days accrued under the Collective Bargaining Agreement

---

[3] Unless the employee wants to avail himself of the provisions of Sec. 7(b), in which case it would be over 450 hours (56.25 days).

[4] See stipulated fact No. 7 and Employer's allegation, pages 4 and 7.

according to the Agreement (over 650 and 450 hours). The Union alleges that the way the Employer pays this leave is against the law (the Decree) and damaging to the interests of the workers,[5] and that the Employer is obliged to pay all the days in excess of the twenty-six (26) that the Decree establishes. In the aforementioned example where the employee accrued 60 days in three years based on the Collective Bargaining Agreement, (20 per year), according to the Union's position, the Employer would have to pay 34 days (the difference between 26 and 60). According to the Union, the Employer cannot use the limit of 650 and 450 hours that the Agreement establishes to pay the excess sick leave accrued, because that is contrary to the limit of 26 days. Is the provision of the Collective Bargaining Agreement in this case contrary to the public policy set forth in the Decree? In no way whatsoever.

Our Superior Court has stated that "In its essence, sick leave with pay is more than just a common fringe benefit of an employee. It is a fundamental necessity for the Puerto Rican worker which arises from an involuntary necessity, not chargeable to the worker. When this leave is made accumulative, the Employer as well as the employee derive benefits from same, since, due to it, absenteeism is dissuaded and the worker is provided with the opportunity of accruing leave for whenever he may need it due to illness."[6] When expressing itself regarding the unliquidable reserve of the sick leave that Decree No. 74 provides, the Honorable Court states that, "The public policy pursued is that of avoiding the possibility of a worker finding himself in the situation of not having accrued sick leave when he may need to avail himself of same due to health reasons, as well as avoiding unjustified

---

[5] See Union allegation Page 3

[6] J.R.T. v. Pier Adm. Board 88 JTS 117.

absenteeism."[7] Even though we are dealing here with Mandatory Decree No. 38, public policy is the same: to establish the minimum unliquidable reserve of sick leave to protect the employees in cases of illness preventing their wages from diminishing, and by ordering the payment of the excess accrued, avoiding unjustified absenteeism and thus promoting productivity. This public policy does not prevent the parties from improving the benefits that same establishes. The right to Collective Bargaining that our labor-management legislation supports, would have no meaning if a Union could not improve in the negotiating table those benefits that either by law or decree, the workers may (at a given moment) be already enjoying, giving and receiving some things for others, as is normal in all negotiations.

In this case, the parties, when negotiating Sections 1, 7(a) and 7(b) of Article XXIV of the Collective Bargaining Agreement, improved the provisions of the Decree by establishing *20* days annually of sick leave, (*7* days over the *13* established by the Decree) and extended the unliquidable reserve of 26 days to 650 hours (81.25 days) and 450 hours (56.25 days). What the parties did is not contrary to public policy but consistent with it, and the provisions of Sections 1, 7(a) and 7(b) of Article XXIV, are perfectly valid.[8] These are the provisions that are in force regarding the accrual of sick leave and liquidable and unliquidable reserves of this type of leave. The provisions of the Decree do not apply in this respect.

Regarding this same matter, the Honorable Secretary of Labor has stated (Opinion 91-4, November 1, 1991) that "there is nothing in the law or in the decrees that prevents an employer from granting annual or sick leave over what the applicable decree

---

[7] J.R.T. v. Vigilante Inc. 90 JTS 30.

[8] What the parties certainly could not do was to reduce or eliminate the unliquidable reserve. — J.R.T. v. Vigilante, supra.

provides. In these cases, the employer (in this case the Collective Bargaining Agreement) shall establish the criteria for their accrual, enjoyment and payment without, of course, having to comply with the criteria of the decree, in order to do it. In fact, he could establish criteria for their accrual, enjoyment and payment, different from, lower than, or better than those of the decree."

We should add that the position assumed by the Union in this case, overlooks the fact that the provisions of Decree No. 38 have been provided in said decree since 1974 (sixth review)[9] and that the Collective Bargaining Agreement in force between the parties was signed on August 16, 1990.[10] The Union was able to negotiate with the Employer that the total amount of leave accrued by the employee over the limit of the 26 days that the Decree establishes, be paid, but it did not do it. On the contrary, it was the Union itself the one that set, in agreement with the Employer, the limit of the 650 and 450 hours that the Collective Bargaining Agreement provides. It has been said that the Collective Bargaining Agreement may be classified as a constitution or basic statute that regulates industrial life in an establishment, and the power to govern is shared by the Union and Management."[11] In reference to the same matter, the Supreme Court of Puerto Rico has stated that "*The importance that the collective bargaining agreement has in the labor field can hardly be overestimated.*" The same, generally, represents the result of long and heated hours of discussion between the employer and the spokesman for his employees' claims. The execution and signing of a collective bargaining agreement represents the triumph of the power of nego-

---

[9] See stipulated fact No. 5

[10] See stipulated documents, Joint exhibit 1 (Collective Bargaining Agreement)

[11] Demetrio Fernández — Labor-Management Arbitration in Puerto Rico; Judicial Magazine UPR — Vol. XXXV — No. 1

tiation over force, of prudence and reason over temerity and violence, and the need that we all have to live in harmony with each other. In short, the collective bargaining agreement is a mechanism that — besides being a contract that, as such, *has force of law between the undersigned parties* as long as it does not violate the laws, morals or public order, *Pérez v. Electric Power Authority*, 87 D.P.R. 118, 122 (1963) — promotes peace and stability in the labor-management field. *Its validity and efficacy, consequently, must always be the object of the most enthusiastic endorsement by the courts.*"[12] (Emphasis added) This Honorable Court has also stated that, "The law recognizes the basic assumptions of civilized life" and that "one of those assumptions which has become a rule of law is that men must comply with their commitments."[13] The Union, in this case, as the exclusive representative of the workers, came to an agreement with the Employer regarding the manner in which the sick leave would be liquidated, extending the unliquidable reserve that the decree establishes, and since the agreement was not contrary to the intention of the Decree, the Union has to abide by the agreement.

We understand, then, that the way in which the Union claims that the Employer liquidate the excess sick leave accrued, is not correct. On the other hand, according to our analysis, the way in which the Employer has been liquidating that leave is not correct either, since what is in force is the Collective Bargaining Agreement and not the Decree. Sick leave is not accrued according to the Decree any longer, but according to the Collective Bargaining Agreement, and the correct way to liquidate the excess sick leave is according to what is provided in sections 7(a) and 7(b) of Article XXIV, that is, over 650 and 450 hours. The Collective Bargaining Agreement is perfectly clear.

---

[12] Liquor Industry Union Serralles Distillery, 116 DPR 348 (1985)

[13] Adorno v. Land Authority 83 DPR 258 (1961) and others.

IV. ANNUAL LEAVE

A. Regarding annual leave, the Collective Bargaining Agreement between the Employer and the HEO provides, we quote:

Article XXIII

"Section 1: The employees covered in the Appropriate Unit *shall be entitled to accrue regular leave at the rate of two and one half (2 1/2) days per calendar month worked.*" (Emphasis added)

...

Section 9: Every employee shall be entitled to receive the equivalent in cash for annual leave accrued as of the date of resignation or separation from service for other reasons."

The Agreement between the Employer and the UETC establishes, in turn, regarding annual leave:

Article XVII

"Section 1: The regular workers and substitutes are entitled to annual leave with pay which may be accrued without limit at the rate of eighteen (18) work hours for each work month up to a total of two hundred and sixteen (216) work hours.

Section 2: Temporary and project workers shall be entitled to annual leave with pay which shall be accrued at the rate of eighteen (18) work hours for each work month up to a total of two hundred and sixteen (216) work hours per year, as long as they work a minimum of one hundred and forty (140) regular hours per calendar month."

B. On the other hand, Mandatory Decree No. 38 provides, regarding the same manner (8th review 1989), we quote:

Article VI — Annual Leave

"Every employee shall be entitled to annual leave with full salary, which shall become effective when he begins his leave at the rate of one and five twelfths (1 5/12) of a work day for each month in which he has worked at least one hundred (100) hours. *This annual leave is equivalent to seventeen (17) work days a year.*"

...

"By means of a written agreement between the employer and the employee, the annual leave may be accrued for more than a year, but never for more than two."

"The employer who does not grant any of his employees the annual leave to which they are entitled after having accrued them for two (2) years, shall grant them the total amount accrued up to that time, paying them two (2) times the corresponding salary for the period in excess of said two years." (Emphasis added)

"In the event that an employee ceases his work, the employer shall pay the total amount accrued, even if it has been less than a year."

"Any contract by means of which an employee gives up, for money or any other reason, his annual leave, shall be illegal and null." (Emphasis added)

V. LIQUIDATION OF THE EXCESS ANNUAL LEAVE — ANALYSIS AND CONCLUSIONS

According to the aforementioned provisions of Decree No.38, (Article VI, supra), the workers belonging to both Unions (H.E.O. and U.E.T.C), accrue 17 days of annual leave per year

(1 5/12 days per month), while according to the Collective Bargaining Agreement (Art. XXIII, Section 1, supra), those belonging to the H.E.O. accrue 30 days a year (2 1/2 days per month) and those belonging to the U.E.T.C., 216 hours per year (18 hours per month). The Unions claim that payment be made according to Decree No. 38, that is, double pay for all the days accrued in excess of 34 days (the maximum accumulative in two years under the Decree at the rate of 17 days per year).

The Employer gives the following example regarding the manner in which he has been paying the annual leave: An employee accrued in 3 years, 90 days of annual leave (30 per year, according to the HEO Collective Bargaining Agreement). Of those 90 days, the Employer assumes that 51 were accrued under the Decree (17 per year) and the rest up to 90 under the Collective Bargaining Agreement. Then he pays the difference between the limit of 34 days and 51 (17 days), at double wage rate.[14] According to the Unions, in this example the Employer would have to pay double time, not for the difference between 34 and 51, as the Employer sustains, but for the difference between 34 and 90 days (56 days).

After analyzing the Agreements, we see that they greatly improve the provisions regarding annual leave by providing, in the case of the HEO, 13 additional days a year over the 17 established by the Decree, and in the case of the U.E.T.C, 10 days. Therefore, just as for sick leave, the provisions in force are those of the Collective Bargaining Agreement and not those of the Decree.

We understand that the intention of the public policy set forth in the Decree by providing double pay for excess annual leave accrued, is to encourage that an employee not work over two years without taking a break for a well-deserved rest. We do not seek to reward the employee, but to oblige the Employer to grant an

---

[14] Employer Allegation p. 13

employee his annual leave. The Decree does not establish specifically a limit of 34 days. That limit is assumed because it is the maximum number of days that can be accrued in two years, under the Decree. Nevertheless, when the parties improve the Decree and provide, as in this case, a number of days annually greater than the 17 provided by the Decree, it is logical to assume that the double pay is not as of the 34 days but as of the maximum accrued by the employee in two years, under the Collective Bargaining Agreement. To impose double pay for annual leave in excess of the 34 days, would have the effect of penalizing the Employer precisely for having improved the number of days that the Decree grants for annual leave, and we do not believe that this was the intention of the Hon. Minimum Wage Board when it provided the penalty of double pay for annual leave in excess of the maximum leave that can be accrued in two years, under the Collective Bargaining Agreement. In our opinion, then, the way in which the Employer has been paying the excess annual leave is not correct, and neither is it correct, the way that the unions claim that they be paid. The Decree having been improved by the Collective Bargaining Agreement, the accrual of annual leave does not apply any longer according to the Decree, but according to the Collective Bargaining Agreement, and the limit over which double pay is imposed is on the maximum that can be accrued under the Agreement. Thus, in the example used by the Employer in which the employee accrues 90 days in 3 years, according to the HEO Agreement, the employee is entitled to enjoy the total 90 days accrued, and he must be paid double for 30 of those days.

The parties have raised a second point and it is regarding the date of effectiveness of the double pay that Decree No. 38, 8th Review (July 6, 1989) provides. The Employer sustains that his obligation to pay the excess annual leave double, began in August, 1991. According to the Employer, "a person who was an active employee on July 1989, that had not taken any annual leave

whatsoever, would accrue 34 days by July, 1991",[15] and any accrual by July 1991 over the 34 days, is what would have to be paid double. The Employer alleges that the amendment to Decree No.38 of 1989, "is of a prospective nature, as are all the amendments to the laws, unless the contrary is specifically provided", and that "no provision whatsoever exists in the Decree that indicates that the 1989 amendment has a retroactive effect. The Employer quotes Article 3 of the Civil Code, 31 L.P.R.A. Sec. 3, which provides that the laws shall not have a retroactive effect, unless they expressly provided the contrary.[16]

The Unions, on the other hand, sustain that in this case the Decree refers to the annual leave "to which (the employee) was entitled after having accrued it for two years" and that the Decree does not refer in any way to the leave that is to be accrued, instead directly penalizes the Employer for having accrued it for over two years."

In *Diaz v. Secretary of the Treasury, 114 — DPR 865*, (a case quoted by the Unions in which a very similar controversy is resolved)[17] our Supreme Court, quoting itself in Warner Lambert

---

[15] We have already stated in our interpretation that it would not be 34 days but 60, according to the HEO Agreement.

[16] The Employer quotes, regarding the matter, cases: Baéz v. Horse-racing Commision, 63 DPR 483 (1944) and Franceschini v. Ujaque, 90 JT 988 (June 27, 1990)

[17] In this case of September 12, 1979, a group of employees from the Treasury Department who had not received a raise in salary for over 5 years, requested from the Secretary a raise in salary equal to a step of the corresponding scale, by virtue of Article 7(2) of Law No. 89 of July 12, 1979, regarding Uniform Retribution. The aforementioned article provides that "As of July 1, 1979 . . . those career employees . . . who had not received any type of raise in salary . . . during an uninterrupted period of five years . . . shall receive a raise in salary."

(continued...)

Co. v. Supreme Court, 101 DPR 378, when referring to Article 3 of the Civil Code invoked in this case by the Employer, stated that:

> "Said Article (Art. 3) only has the extent of a general rule of interpretation of statutes. It is not a rigid principle of absolute application . . . In Manresa's opinion, the article in itself is superfluous, since" . . . with the simple use of the general rules of interpretation of the law, the same conclusion would always be reached, even if the Code did not exist". . . Scaveola also adopts a flexible interpretation affirming with Laurent that "the legislator must not be chained to an absolute principle that would limit his freedom of action in detriment to society and the individuals." . . . This rule of interpretation is not a strait jacket. When the legislature has not expressed its intention clearly, said rule must not be followed blindly, ignoring the factors which could shed light on the legislative intention."

---

[17](...continued)

The Secretary denied the employees' request adducing that the provision of the applicable law was Sec. 8.4 of the Personnel Regulation and that the request was premature because the date in which they would be entitled to the raise was December 1, 1981, because the five-year period for that type of raise began as of November 30, 1976 (date of approval of the Personnel Regulation). The Board of Appeals of the Personnel System, denied the employees' appeal, but the Superior Court revoked the Board and sustained the latter's appeal. In a petition for certiorari, at the request of the Secretary of the Treasury, the Supreme Court intervened. The Supreme Court sustained the employees' complaint and resolved, by interpreting the phraseology of aforementioned Article 7(2), that the intention of the legislator was that same cover every employee who by July 1, 1979, had already accrued five consecutive years without receiving a raise in salary.

As we may notice, the Honorable Court warns us against the use of the rule of interpretation of the Civil Code quoted by the Employer as a strait jacket when judging the intention of the law.

Upon examining Decree No. 38, (in this case, the law), we find that in its 7th Review it provided, and we quote: "Any agreement by means of which the employee or worker gives up for money or any other reason, his annual leave, shall be illegal and null." It also provided that "by means of a written agreement between the employer and the employee, the latter (annual leave) may be accrued for more than a year, but never for more than two." This means that the annual leave could be accrued for two years, but in no case should an employee work for over two years without, in fact, taking his annual leave. The 7th Review of this Decree did not provide anything regarding double pay for excess annual leave accrued. That is, it did not provide any penalty whatsoever against the Employer for violating the Decree. The 8th Review of the Decree is the one that introduces double pay for leave in excess of that which may be accrued in two years. Both in the 7th as well as the 8th Review of Decree No. 38, it can be clearly observed that the public policy set forth is that of encouraging the employee to take, as a matter of fact, his annual leave, and that in no case may he work for over two years without taking it. What the 8th Review does is to provide the double pay that the Decree did not have, precisely to oblige the Employer to give his employees annual leave. We see that the 8th Review of the Decree began to be in force on July 6, 1989.[18] As of that date, states this reviewed Decree, "the Employer who does not grant any of his employees the annual leave to which they are entitled after having accrued it for two (2) years, shall grant them the total amount accrued up to that time, paying them (2) times the corresponding salary for the excess of the two years."

---

[18] See said Decree p. 10.

We understand that the phrase "does not grant", must be interpreted as referring to the period as of that moment, that is, as of July 6, 1989; not two years as of July 6, 1989, as the Employer sustains. Notice that if the Employer by that date had not given an employee for over two years, his annual leave, after the maximum that could be accrued, he was in clear violation of the public policy provided in the decree, and that is what the double pay for the maximum excess leave that can be accrued in two years, seeks to prevent. It makes no sense to think that the Hon. Minimum Wage Board had the intention of preventing the employer from violating the public policy within two years and not at the precise moment in which it made effective the review of the Decree.

Therefore, we understand that the date in which the Employer is obliged to abide by the provision of double pay for annual leave provided by Decree No.38 (8th Review), is as of July 6, 1989, the date which the Decree itself indicates that the Review is to be in force, as is claimed by the petitioning unions in the instant complaint.

VI. DECISION AND REMEDIAL ORDER

In relation to sick leave, the way in which the Employer has been liquidating the excess leave accrued, is incorrect. The accrual as well as the payment for the excess accrued must be made according to the provisions of Article XXIV, Sections 1, 7(a) and 7(b) of the collective bargaining agreement, respectively, and not based on the Decree, unless the HEO accepts the way in which the Employer is currently doing it.

Regarding the way in which the Employer pays the excess annual leave, we understand that it is also incorrect.

Annual leave as sell as sick leave is accrued according to what the Collective Bargaining Agreement provides, without taking into consideration the Decree. Once the employee accrues the maximum that may be accrued in two years under the Agreement,

he is entitled to double pay for all leave that exceeds the maximum that may be accrued in those two years, this, as of July 6, 1989.

The Employer shall pay the excess annual leave to all employees who are members of the H.E.O. and the U.E.T.C., in agreement with what was previously provided, as well as pay these employees any other penalty that corresponds by law.[19] We shall provide regarding the petition for attorney fees of the labor party, after the Employer informs us the total amount of fees involved.

In Hato Rey, Puerto Rico, on December 24, 1992.

(SIGNED)
PEDRO SANTOS
ARBITRATOR

---

[19] Regarding the additional compensation to be paid, see Law No. 96 of June 26, 1956, amended (PR Minimum Wage Act) Sec. 27(a).

CERTIFICATION

Filed on record, on December 24, 1992; a copy is sent by mail on this same date to the following persons:

1. MR. JUAN R. ROSA LEON, PRESIDENT
   BROTHERHOOD OF OFFICE AND
   COMMERCIAL WORKERS AND AFFILIATED
   BRANCHES, INC.
   BOX 8599 FDEZ JUNCOS STA.

2. MR. MIGUEL HERNANDEZ, DIR. REL. LAB.
   P.R. PORT AUTHORITY
   G.P.O. BOX 2829
   SAN JUAN, P.R. 00936

3. ATTY. FRANCISCO ACEVEDO
   P.O. BOX 366283
   SAN JUAN, P.R. 00936-6283

4. ATTY. NORMAN PIETRI
   BOX 19115
   FERNANDEZ JUNCOS STA.
   SAN JUAN, P.R. 00910-9115

5. ATTY. JOSE E. CARRERAS
   MIDTOWN BLDG. OFFICE-206
   421 MUÑOZ RIVERA AVE.
   HATO REY, P.R. 00918

JANNETTE MARTINEZ
SECRETARY

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix C — Decision of the Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Puerto Rico Port Authority Defendant — Appellant v. Brotherhood of Office Workers and others Plaintiffs — Appellees	No. RE-93-344	Appeal Review

Court composed of Chief Justice Andreu García and Associate Justices Messrs. Negrón García and Hernández Denton.

DECISION

San Juan, Puerto Rico, on September 10, 1993

This appeal, having been received as a certiorari — as is proper — is denied.[1]

In its first *allegation*, petitioner, the Ports Authority, holds that the retroactive application of Mandatory Decree No. 38 was not in accordance with the law. It adduces that Article 3 of the Civil Code, which prohibits the retroactive application of the laws, was violated. Petitioner is not right.

In *Warner Lambert* v. *Tribunal*, 101 D.P.R. 378, 386 (1973), we established that Art. 3 of the Civil Code is a general rule of interpretation and not "a principle of inflexible application"; approach reaffirmed in *Díaz* v. *Secretario de Hacienda*, 114 D.P.R. 865, 872 (1983).

---

[1] Last September 3 we denied a request of the Brotherhood. There, in an explained decision, we set forth the grounds. In their pertinent part, they are incorporated into this Decision.

Based on precept interaction, the retroactive application of the penalty imposed in this case in the Mandatory Decree must be assessed in the light of the public policy it implemented. If said public policy fosters that no employee works more than two years without enjoying his vacations, the penalty imposed advances and is in consonance with the public policy. On the other hand, if its application were only prospective, as the Authority contends, we would be sidestepping the safeguard that Decree No. 38 offers the workers. Under both avenues, said legally protected interest prevails.

II

In the *second* allegation, petitioner, the Authority, holds that the additional compensation imposed under Law No. 96 of June 26, 1956, is inadmissible. It tells us that it constitutes a double penalty and its effect, far from being compensatory, is punitive.[2]

On this particular, we notice that the arbitrator provided that "the employer shall pay excess vacations to all employees who are members of the H.E.O. and of the U.E.T.C. pursuant to the above provision, *as well as pay these employees any other penalty to which they are entitled under the law*", specifically he made reference to the aforestated Law No. 96.

In *Salgado* v. *Tribunal*, 92 D.P.R., 367, 371 (1965), we stated that "civil penalty sources in cases concerning the claiming of wages are Art. 13 of Law No. 379 of May 15, 1948, 29 L.P.R.A., sec. 282, and *Sec. 30(a) of the Minimum Wage Act of 1956, 29 L.P.R.A. 246(b)*". Consequently, further on we confirmed that the penalty is in accordance with the law "1. when the employer pays a compensation lesser than the one fixed for regular work hours and overtime; and, 2. *when the employee is*

---

[2] The penalty is equivalent to a sum equal to the compensation not paid by the Employer as liquidation of damages.

paid a compensation lesser than the one prescribed in the Minimum Wage Act, in a mandatory decree, in a collective bargaining agreement or in an individual work contract". (Pages 371-372) — emphasis supplied.

We concluded that the penalty was in order since it reactivates when an employer does not pay his workers what is adequate under the law. To sum up, the Authority is subject to the *additional* penalty imposed by Law No. 96. Its obligation to pay the accrued excess vacations *arose* by virtue of Decree No. 38 and its noncompliance gave rise to it.

III

In its *third* allegation, the Authority contends that the arbitrator erred by retaining jurisdiction over the award in order to determine the amount of attorney's fees, inasmuch as the "Functions Officio" doctrine, which establishes that once the award is issued the arbitrator loses jurisdiction, is applicable. The Authority is not right either.

In this case, the arbitrator expressly determined that he would impose the amounts of attorney's fees in accordance with the *sum total of the wages owed by the authority*. That act neither modified nor altered his award; but merely was imperative of the main remedy: adjudication of the main controversies and their subsequent computation.

The Court adopted it and the Chief Deputy Clerk certifies.

Carmen E. Cruz Rivera
Chief Deputy Clerk

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Hilda Gutiérrez
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix D — Decision of the Supreme Court of Puerto Rico Denying Motion for Reconsideration

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

PUERTO RICO PORT AUTHORITY Defendant — Appellant vs. BROTHERHOOD OF OFFICE WORKERS AND OTHERS Plaintiffs — Appellee	No.: RE-93-344	REVIEW

DECISION

In San Juan, Puerto Rico, on January 28, 1994.

Regarding the Motion for Reconsideration of September 27, 1993, it is Denied.

It was decided by the Court and certified by the General Chief Deputy Clerk. Associate Justice, Mr. Alonso Alonso, did not intervene.

(Signed)
CARMEN E. CRUZ RIVERA
GENERAL CHIEF DEPUTY CLERK

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix E — Decision of the Supreme Court of Puerto Rico Denying Second Motion for Reconsideration

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

PUERTO RICO PORT AUTHORITY Defendant — Appellant vs. BROTHERHOOD OF OFFICE WORKERS AND OTHERS Plaintiffs — Appellees	No.: RE-93-344	REVIEW

DECISION

In San Juan, Puerto Rico, on February 25, 1994.

As to the second motion for reconsideration filed in this case, it is denied. Abide by the decision.

It was decided by the Court and the General Chief Deputy Clerk certifies it. Chief Justice, Mr. Andréu García, and Associate Justice, Mr. Alonso Alonso, did not intervene.

(Signed)
Carmen E. Cruz Rivera
General Chief Deputy Clerk

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Notice of Entry of Decision

(Translation)

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

PUERTO RICO PORT AUTHORITY — APPELLANT
VS.
BROTHERHOOD OF OFFICE,
BUSINESS WORKERS AND
OTHERS — APPELLEE
CASE: RE-93-0344
ORI CASE: KAC-93-0116 CIVIL ACTION

CIVIL ACTION OR
OFFENSE

DOMINGUEZ HERNANDEZ DANIEL R
PO BOX 191732
SAN JUAN, P.R.

000000919
NOTICE

I CERTIFY THAT IN RELATION TO THE MOTION FOR RECONSIDERATION, THE COURT ISSUED THE ATTACHED DECISION:

PIETRI CASTELLON NORMAN — P.O. BOX 19115 — FERNANDEZ JUNCOS STATION — SAN JU

CARRERAS ROVIRA JOSE E — MIDTOWN BLDG, OFFICE 206 — 421 MUÑOZ RIVERA AVE.
ARBITRATION BUREAU — LABOR DEPT. — PRUDENCIO MARTINEZ BLDG.- M. AVE

SAN JUAN, PUERTO RICO ON MARCH 1, 1994

(SIGNED)
FRANCISCO R. AGRAIT LLADO
GENERAL CLERK
(INITIALS)
DEPUTY CLERK

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix F — Statutes Involved

The relevant provisions of the Puerto Rico minimum wage laws are as follows:

Section 245a.

(a) There is hereby created in the Department of Labor and Human Resources a Minimum Wage Board . . . .

(e) The Board shall be empowered to approve, amend and repeal the regulations needed to carry out the purposes of section 245 et seq. of this title. Said regulations shall have force of law once they have been duly promulgated.

(P.R. Laws Ann. tit. 29, §245a(a) & (e))

Section 245l.

(a) The Board shall publish the draft decree recommended by the Committee, and the interested parties shall be allowed an undeferable term of thirty (30) days, reckoning from the date of publication of the draft decree in a newspaper of general circulation in Puerto Rico, for the filing of memoranda for or against approval of said draft decree on the basis of the data and information received by the Committee.

(P.R. Laws Ann. tit. 29, §245l(a))

Section 245p.

The Board shall revise the minimum wages and the provisions regarding vacation and sick leave fixed by section 245 et seq. of this title, or by decrees or orders of the Board with regard to each industry and the provisions on minimum compensation guarantees if there should be any, at least once every two (2) years.

(P.R. Laws Ann. tit. 29, §245p)

Section 246b.

(a) Any laborer or employee who receives a lower compensation than that fixed in section 245 et seq. of this title or in a mandatory decree, order or regulation of the Minimum Wage Board or in a collective bargaining agreement or an individual work contract shall be entitled to recover through a civil action the unpaid difference up to the total amount of the compensation to which he is entitled for wages, vacation, sick leave or any other benefit, plus an amount equal to the unpaid amount as additional compensation, besides the costs, expenses, interest and attorney's fees for the proceedings, which fees shall be in a reasonable amount, in no case lower than fifty (50) dollars, all this irrespective of any agreement to the contrary.

(P.R. Laws Ann. tit. 29, §246b(a))

Mandatory Decree No. 38 (8th revision 1989) provides in relevant part:

> Every employee shall be entitled to fully paid vacation which shall become effective upon beginning to use them at the rate of one and five-twelfths (1 5/12) work days for each month in which he has had at least one hundred (100) work hours. This vacation time is equivalent to seventeen (17) work days per year.
>
> Vacation time shall be used consecutively by the employee, provided that at the written request of the employee and by mutual agreement, these may be divided into periods of no less than five consecutive days and shall be granted annually or semiannually in such a manner so as to not interrupt the normal operations of the business, for which purpose the employer shall establish the pertinent shifts. The employee may not demand to use his vacation time until he has accumulated it. The use of vacations shall be considered as time worked.

By an agreement in writing between the employer and employee, vacation time may be accumulated for more than one year, but never more than two.

Any employer who does not grant any of his employees the vacation time that he is entitled to after it has been accumulated for two (2) years, must grant him the total accumulated, paying two (2) time the corresponding salary for the period in excess of said two years.

Appendix G — Excerpt from Petitioner's Motion for Reconsideration

IN THE SUPREME COURT OF PUERTO RICO

PUERTO RICO PORT AUTHORITY Appellant v. BROTHERHOOD OF OFFICE, TRADE, AND OTHER WORKERS Appellee	No. RE-93-0344 RE:

MOTION FOR RECONSIDERATION

NORMAN PIETRI CASTELLON, ESQ.
P.O. BOX 19115
FERNANDEZ JUNCOS STATION
SAN JUAN, P.R. 00919-9115

JOSE E. CARRERAS ROVIRA
MIDTOWN BUILDING
OFFICE 206
421 MUÑOZ RIVERA AVENUE
HATO REY, P.R. 00918

CONCILIATION AND ARBITRATION
BUREAU OF THE LABOR
DEPARTMENT
PRUDENCIO RIVERA MARTINEZ BLDG.
505 MUÑOZ RIVERA AVE.
HATO REY, P.R. 00918

DANIEL R. DOMINGUEZ, ESQ.
BAR ASSOC. MEMBERSHIP NO. 4949
JORGE C. PIZARRO, ESQ.
BAR ASSOC. MEMBERSHIP NO. 10875
DOMINGUEZ & TOTTI
P.O. BOX 191732
SAN JUAN, P.R. 00919-1732
TEL. 753-7910

* * *

ARGUMENT

A.

IN THE FIRST PLACE, a reconsideration of the Denial issued is justified because the interpretation that this Honorable Forum has endorsed with the "Denied" it issued, violates the Constitution of the Commonwealth of Puerto Rico, Art. II Sec. 7, and the Constitution of the United States of America, Art. I Sec. 10. This is so because, by virtue of a rule not even by means of law- what, for many, many years was perfectly legitimate and constitutional, in accordance with the Collective Bargaining Agreement (a contract), and the past reviews of Decree Number 38, has become illegal.

At the Port Authority, until midnight of July 5, 1989, vacation days *accrued in excess of the requirements of the Mandatory Decree* were simply accrued at the employee's discretion, without the imposition of penalties for the subsequent enjoyment by the employee or their liquidation upon cessation of his duties. In this sense, the vacation days accrued in excess of the Decree were transformed into a type of savings account, once the employee had used at least the vacation owed by Decree (17 days per year). Once the employee had taken those seventeen (17) days per year, the employee, at his convenience, could either use the full number of days authorized by the Agreement (13 additional days), or accrue one or several days in excess of the Decree, up to the

maximum authorized by the Collective Bargaining Agreement. All of this was in perfect harmony with the existing Collective Bargaining Agreement, the contract that governed the relationship between the herein litigating parties[2]. In other words, under the Mandatory Decree, seventeen(17) days of vacation per year are ordered. Under the Collective Bargaining Agreement, thirty (30) vacation days per year were granted. In this sense, those days in excess of the ones required by the Mandatory Decree, stipulated in the Collective Bargaining Agreement (13 additional days per year), could be accrued, without penalties, at the discretion of the employee, under the Collective Bargaining Agreement[3].

However, on July 6, 1989 and according to the interpretation accepted by this Honorable Forum, Decree 38 suddenly rendered illegal the accumulation of excess days which, under the Agreement, had been legal. In so doing, it forced the Port Authority to pay four (4) times for each accrued day and to respond to a millionaire claim by virtue of an interpretation of the Mandatory Decree concerning certain aspects that, under the current Collective Bargaining Agreement, were perfectly legal and valid.

---

[2] Specifically, Article XXXIII, Secs. 9 and 12 of the Collective Bargaining Agreement, provide (page 100 of the appendix) as follows: "Section 9: All employees shall be entitled to receive in cash the equivalent of the annual leave he has accrued as of the date of his resignation or separation from service for other causes. Section 12: Employees who are approaching retirement after more than ten (10) years of service with the Authority shall have no limitation of accrual during the last three (3) years of service, after they have officially, finally and firmly announced their intention to retire. If the employee fails to retire after the three (3) years previously announced have elapsed, the first of the three (3) years thus accrued shall be liquidated on the basis of the salary earned during said year".

[3] In fact, under Mandatory Decree 38, payment of those accrued excess days was expressly prohibited. See *Conclusion Infra* of this motion.

The statements made by the Honorable Secretary of Labor in his *Opinion 91-4, Labor Journal*, Volume XVI, No. 50, March, 1992 are fully applicable when he states:

There is nothing in the law, nor in the decrees, that can prevent an employer from granting *vacation or sick leave* in excess of the provisions of the applicable decree. In these cases, the employer is the one who shall establish the criteria for their accrual, use and payment without having to comply, of course, for that purpose, with the criteria of the decree. **In fact, he could establish criteria for their accrual, use and payment which are different from, inferior to or better than the decree.** Although these are not rights under the decree, they are contractual rights whose parameters are the non violation or reduction of the decree rights. An employer may grant, by virtue of an individual work contract, or of a collective bargaining agreement, more benefits than a mandatory decree, but never fewer". See also *Junta Relaciones del Trabajo v. Vigilante, Inc.*, 1990, 90 JTS 30. (Emphasis added).

Hence, from the aforementioned Secretary's Opinion it is crystal clear that the parties in a Collective Bargaining Agreement can stipulate the manner in which they are going to accrue and pay benefits over and above those granted by the law, since all that the Mandatory Decree establishes are "working conditions" *JRT v. Vigilantes*, Supra p. 7513. And the manner in which that vacation is going to be accrued and paid was necessarily considered in the negotiation process that culminated in the Collective Bargaining Agreement. Had the parties known that benefits beyond those provided in the Decree itself would be regulated, perhaps the results of the negotiation would have been different. Therefore, said agreement having been set forth in a previous contract, the state cannot -by constitutional mandate- alter the manner in which those greater concessions are to be liquidated.

Trusting in this power, and under the constitutional protection against the violation of contractual relations, the Port

Authority relied on the contract entered into with the Union regarding vacation, as set forth in the Collective Bargaining Agreement. Therefore, there cannot prevail an interpretation whereby the State retroactively penalizes one of the contracting parties, because of the manner in which concessions greater than those provided in the decree are liquidated. See in Puerto Rico *Warner Lambert co. v. Superior court*, 101 D.P.R. 378 (1973) and, in the United States, *U.S. Trust Corp. of New York v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978); Tribe, *American Constitutional Law* 2d Ed. 1988 p. 617 et seq.

* * *

Appendix H — Excerpt from Petitioner's Second Motion for Reconsideration

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

PUERTO RICO PORT AUTHORITY Defendant — Appellant vs. BROTHERHOOD OF OFFICE WORKERS AND OTHERS Plaintiffs — Appellee	No.: RE-93-0344 RE: REVIEW

SECOND MOTION FOR RECONSIDERATION

ATTY. NORMAN PIETRI CASTELLON
P.O. BOX 19115
FERNANDEZ JUNCOS STATION
SAN JUAN, PR 00919-9115

ATTY. JOSE E. CARRERAS ROVIRA
MIDTOWN BUILDING
OFFICE 206
421 MUÑOZ RIVERA AVENUE
HATO REY, PR 00918

LABOR DEPARTMENT CONCILIATION
AND ARBITRATION BUREAU
PRUDENCIO RIVERA MARTINEZ BLDG.
505 MUÑOZ RIVERA AVE.
HATO REY, PR 00918

ATTY. DANIEL R. DOMINGUEZ
BAR ASSOC. MEMBER NO. 4949
ATTY. JORGE PIZARRO
BAR ASSOC. MEMBER NO. 10875
DOMINGUEZ & TOTTI
P.O. BOX 191732
SAN JUAN, PR 00919-1732
TEL.: 753-7910

* * *

II.

SECOND, it is an overused doctrine in our jurisdiction that the parties in a Collective Bargaining Agreement may agree upon the manner in which the benefits negotiated in same are to be accrued and paid. More rightly so, when the benefits exceed those granted by law.[4]

Inevitably, the manner in which the vacation days agreed to in the Collective Bargaining Agreement were to be accrued and paid, was a fundamental consideration in the negotiation process which was finally stated in the Collective Bargaining Agreement by the granting of thirty (30) days. Had the parties known that in the Decree the accruement and payment of vacations would be regulated in detriment to the Authority, obliging double pay for those days, maybe the result of the negotiation would have been otherwise. Therefore, once that agreement is set forth in a previous contract, the State is precluded -- by constitutional imperative -- from altering the manner in which those major concessions are to be liquidated. Precisely, under constitutional protection against the

---

[4] Notice that all that the Mandatory Decree establishes are "Minimum working conditions" which may be improved during the process of collective negotiation. ***JRT vs. Vigilante***, 90 JTS 30, Opinion 91-4 of the Labor Secretary, Revista del Trabajo, Volume XVI, No. 50, March 1992.

deterioration of contractual relations, was that the Ports Authority trusted that what was contracted with the Union (as stated in the Collective Bargaining Agreement regarding vacations) would not be altered retroactively by the State. Therefore, an interpretation of the Mandatory Decree by means of which the State retroactively penalizes one of the contracting parties because of the manner in which concessions greater than what is provided in the Decree are liquidated, cannot prevail. See in Puerto Rico ***Warner Lambert Co. vs. Tribunal Superior***, 101 D.PR.R. 378 (1973) and in the United States, ***U.S. Trust Corp. of New York vs. New Jersey***, 431 U.S. 1 (1977); ***Allied Structural Steel vs. Spannaus***, 438 U.S. 234 (1978); Tribe, *American Constitutional Law*, 2d Ed. 1988, p. 617 and ss.

That is why the "Denied" issued violates the Constitution of the Commonwealth of Puerto Rico, Article II, Sec. 7 and the Constitution of the United States of America, Article I, Sec. 10.

III.

As in previous reviews, under the seventh review of Mandatory Decree No. 37 (p. 146 Appendix) in force since 1983, up to July 5, 1989, it was textually provided:

> **"ANY AGREEMENT BY MEANS OF WHICH AN EMPLOYEE OR WORKER WAIVES, FOR MONEY OR OTHER CAUSES, THE ENJOYMENT OF HIS VACATIONS, SHALL BE ILLEGAL AND VOID."**

In faithful compliance with the above-mentioned provisions, the employer — in this case, the Port Authority — until July 1989 **was legally precluded from paying any money whatsoever** to its employees for vacations accrued in excess of two (2) years, due to an express provision of the Mandatory Decree.

On the other hand, under Mandatory Decree Number 37 in its 8th Review (p. 161 Appendix) which was in force as of July 6, 1989, the following was expressed for the first time in the history of Decree Number 38:

"THE EMPLOYER WHO DOES NOT GRANT ANY OF HIS EMPLOYEES THE VACATION TO WHICH THEY ARE ENTITLED AFTER HAVING ACCRUED THEM FOR TWO (2) YEARS, MUST GRANT THE TOTAL AMOUNT ACCRUED AS OF THAT MOMENT, PAYING TWO (2) TIMES THE SALARY CORRESPONDING TO THE PERIOD IN EXCESS OF SAID TWO (2) YEARS."

It is necessary to repeat that, as it has been explicitly interpreted by this Honorable Forum in the "Denied" issued in the Appeal, implicitly in the "Denied" referring to the Reconsideration, with the above-mentioned provision — which is completely contrary to the original — the Port Authority is obliged to pay four (4) times for each day accrued. Precisely, the "debt" arises because of the days that the Authority, up until then, was precluded from paying and suddenly was obliged to respond in millions for vacations accrued and not paid during the period in which the 7th Review of Mandatory Decree Number 38, was in force. Review which textually precluded the economic satisfaction of said vacation days. Hence, the valid interpretation of this Honorable Forum implies a violation of the local and federal constitutional rights of the Port Authority.

* * *

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix I — Opinion No. 91-4
of the Secretary of Labor of Puerto Rico

(Translation)

[logo] Department of Labor and Human Resources

Opinions of the Secretary
Concerning Legislation to Protect Labor

Ruy Delgado Zayas
Secretary
Opinion 91-4 Department of Labor and Human Resources

November 1, 1991

VACATION LEAVE IN EXCESS OF TWO YEARS

Many of the mandatory decrees approved by the Puerto Rico Minimum Wage Board provide that the accrued days of vacation leave in excess of two years must be paid at the rate of double the corresponding wage.

That is, these mandatory decrees direct that in the case of those vacation days which have accrued for over two years and which the employee has still not enjoyed, the employee must grant the employee the enjoyment of these days in excess of two years by paying him or her double his/her wage for said days.

The rules on accrual, enjoyment and payment of vacation leave provided in the mandatory decrees, are established by these same decrees and are addressed to the leave created therein.

The Department of Labor and Human Resources administers the laws which protect labor and see to their faithful compliance. By way of a tool to help the labor-management community to observe said laws, we will periodically publish opinions which convey to you the official interpretation corresponding to their various provisions.

All the decrees provide that the employees shall be entitled to vacation leave with full pay which shall be made effective upon beginning to enjoy it. The majority of the decrees allow vacation leave, by written agreement between employer and employee, to accrue without being enjoyed for more than a year, but never for more than two years.

That is public policy regarding the vacation leave provided by these decrees. That is, that the employee is to enjoy his or her paid vacation leave upon beginning to enjoy them annually or by exception every two years.

It is in order to discourage the violation of that public policy that the decrees usually establish that the employer who does not grant any employee thereof the vacation leave to which he/she is entitled after he/she has accrued it for two (2) years, must grant him/her the total accrued thus far, paying him/her two (2) times the corresponding salary for the period in excess of said two years.

It concerns a "penalty" which is imposed on the employer for failing to abide by the rule of the decree, with respect to the days for vacation leave which accrue due to the decree.

There is nothing in law nor in the decrees which prevents an employer from granting vacation or sick leave on top of that which is provided by the applicable decree. In these cases, the employer is the one who shall establish the criteria for the accrual, enjoyment and payment thereof, without, clearly, having to comply with the criteria of the decree therefor. In fact, it could establish different, lesser or greater criteria for its accrual, enjoyment and payment than those in the decree.

Although they are not rights from the decree, this is a question of contractual rights whose parameters are the noninfraction or reduction of the rights from the decree. By virtue of an individual job contract or a collective bargaining agreement, an employer may grant more benefits than a mandatory decree, but never fewer. See Labor Relations Board vs. Vigilante, Inc., 1990, 90 JTS 30.

It should be clear, nevertheless, that as to the vacation days established by the decrees, which have been accruing for more than two years, what the decrees require is for the employer be granted it, that is, that he/she be permitted to enjoy them and he or she be paid double, unless a decree otherwise provides. As a general rule, the requirement of the decree is not complied with by merely paying him/her double, one must allow the enjoyment of the leave with pay.

This right to vacation leave with pay which is established by the decrees may not be waived, according to Section 18 of Act No. 96 itself, of June 26, 1956, 29 LPRA 245. As an exception the mandatory decrees usually provide that waiver of the actual enjoyment of vacation leave in exchange for money shall be unlawful and invalid. Some allow it as long as the worker is in agreement and authorization is obtained therefor from the Department of Labor and Human Resources.

Violation of this rule shall cause the payment to be unlawful and invalid. Therefore, it could not be raised as a defense by the employer. The employee in these cases shall be entitled not only to the enjoyment of vacation leave but also to payment therefor. This is so, moreover, because of the fact that as a general rule this right to vacation leave consists of both things, *enjoyment and payment of the leave*. To allow the employer to comply with his obligation to only authorize the employer to be absent without the corresponding pay for the days to which he or she is entitled, would make a mockery of the decree's purposes. The vacation leave created by the decrees refer to certain days on which the employee is entitled to be absent with pay. It is not the intention of the decree that his or her enjoyment be divided up, that is, the employee be allowed to be absent without pay, to be paid later on, or that he or she be paid a sum of money and then later on be allowed to be absent, but without pay. This is not the vacation leave contemplated by the mandatory decrees.

An examination of same reflects that without exception, all of them grant the right to vacation leave with pay upon beginning to enjoy it and that is the public policy which gives rise to this right, addressed at protecting the health and well-being of workers.

[Signature]
Ruy N. Delgado Zayas
Secretary of Labor and
Human Resources

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation made
and/or submitted by the interested party
/s/ Thomas H. Kavelin
4/22/94
Certified Court Interpreter
Administrative Office of the
United States Courts

Consultation No. 12400 of the Solicitor of Labor of Puerto Rico

(Translation)

JULY 13, 1984

CONSULTATION Number 12400

We refer to your recent communication related to Mandatory Decree No. 81, in which the following situation is stated:

> "Some of your employees are entitled to twenty (20) days of Sick Leave due to Company policy. These employees have more than seven (7) years of service. If the Company grants these employees fourteen (14) consecutive days of vacation first, according to what Mandatory Decree No. 81 requires, and then grants them the other six (6) days of vacation, does the preceding violate the aforementioned Mandatory Decree?"

In this case, the employer's action does not violate what is established in Mandatory Decree No. 81 regarding the benefit of consecutive vacation days, since the worker uses them up completely and afterwards receives another six (6)-day rest period as *additional vacations granted by the employer*. The rule applies to the vacations set by the Mandatory Decree, only. The parties have the power to determine the form and manner of using the days in excess of those established by mandatory decrees.

Cordially,
(Signed)
Néstor Barbosa Vargas
Solicitor of Labor

NBV/rca

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation prepared by
/s/ Annie Flores
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix J

(Translation)

STIPULATION OF FACTS

1. The Port Authority has always paid excess accrued vacation leave in accordance with the Collective Bargaining Agreement.

2. The Brotherhood of Office Employees (HEO, for its initials in Spanish) demands that the payment of the excess accrued leave be paid in accordance with Mandatory Decree No. 38.

3. The employees of the HEO annually accrue 30 days of vacation leave in accordance with the Collective Bargaining Agreement, while accruing 17 days through Mandatory Decree No. 38.

4. Concerning annual vacation leave, there is a similar controversy to that of sick leave. The Collective Bargaining Agreement in its Art. XXIII, Sec. 1, provides:

> "Section 1: Covered employees in the Appropriate Unit shall be entitled to accrue regular leave at the rate of two and a half (2 1/2) days for every calendar month worked."

Mandatory Decree No 38 (8th Revision 1989) provides, in part, the following:

> "All employees shall be entitled to vacation leave at full salary which shall be effective upon beginning the enjoyment thereof at the rate of one and five twelfths (1 5/12) work days for every month in which he/she has had at least one hundred (100) work hours. This vacation leave is equivalent to seventeen (17) working days per year.

The employee shall enjoy the vacation leave consecutively, provided that at the written request of the employee and by mutual agreement it may be divided into periods of no less than five (5) consecutive days and shall be granted annually or semi-annually in such wise that they do interrupt the normal functioning of the company, to which end the employer shall appropriately stagger the turns. The employee may not demand the enjoyment of his/her vacation leave until he/she has accrued it. The enjoyment of vacation leave is considered as time worked.

By written agreement between employer and employee, vacation leave may be accrued over more than one year, but never for more than two.

The employer who does not grant any employee thereof the vacation leave to which he/she is entitled after he/she has accrued it for two (2) years, must grant him/her the total accrued thus far, by paying him/her two (2) times the corresponding salary for the period in excess of said two years."

5. For years the Authority has paid excess accrued vacation leave in accordance with the provisions of the Collective Bargaining Agreement. The HEO is now demanding that it be paid in accordance with Decree No. 38 and demands that everything accrued in excess of 26 days be paid, including the additional days provided by the Agreement.

6. As to vacation leave, the provision on two years' accrued excess pay at double time was made effective in the 8th Revision (July 6, 1989). There was no provision on any vacation pay in the former revision (1983), except that the employee stop working.

[Translator's Note: This page appears to be the third page of the document beginning on the page marked "021", rather than the one beginning on the page marked "023". This would mean that the third page of the second document is missing.]

No. 38 and demands that everything accrued in excess of 26 days, including the additional days provided by the Agreement, be paid.

7. The Authority proceeded to make a payment last December 13, 1991 corresponding to this leave. Said payment was made, alleges the Authority, in accordance with its theory on its obligation to pay. The HEO feels that said payment is erroneous, both based on the theory used, and based on the computation used. The parties reserve the right to verify and contest said amounts in accordance with their records and any Award which is forthcoming in due time.

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation made
and/or submitted by the interested party
/s/ Thomas H. Kavelin
4/22/94
Certified Court Interpreter
Administrative Office of the
United States Courts

Appendix K

(Translation)

[logo] PORT AUTHORITY/COMMONWEALTH OF PUERTO RICO
COLLECTIVE BARGAINING AGREEMENT
between
PUERTO RICO PORT AUTHORITY
and
H.E.O.
PUERTO RICO BROTHERHOOD OF OFFICE AND BUSINESS WORKERS AND ASSOCIATED BRANCHES
1-1-87 TO 12-31-89

ARTICLE XXIII
REGULAR VACATION LEAVE

Section 1: Covered employees in the Appropriate Unit shall be entitled to accumulate regular leave at the rate of two and a half (2 1/2) days for every calendar month worked.

Section 2: Regular vacation leave shall accrue from the employee's first day on the job.

Section 3: The employee shall enjoy vacation leave in accordance with a program which shall be prepared for said purpose by the Authority in each Bureau, taking as a basis service needs, the non-interruption of same and employee preferences.

Section 4: All employees shall be bound to enjoy regular vacation leave for a period no less than twenty (20) days—

* * *

[four sets of initials appear in the left-hand margin of both pages of the original]

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be a correct translation made
and/or submitted by the interested party
/s/ Thomas H. Kavelin
4/22/94
Certified Court Interpreter
Administrative Office of the
United States Courts

(Translation)

COLLECTIVE BARGAINING AGREEMENT
BETWEEN
UNION OF TRANSPORTATION
EMPLOYEES OF CATAÑO
AND
PORT AUTHORITY
EFFECTIVE TERM
APRIL 1, 1987 — MARCH 31, 1990

ARTICLE XVII
VACATION LEAVE

Section 1: Regular and substitute workers shall be entitled to paid vacation leave which shall accrue on an unlimited basis at the rate of eighteen (18) working hours for every month worked up to a total of two hundred and sixteen (216) working hours per year.

Section 2: Temporary and project workers shall be entitled to paid vacation leave which shall accrue at the rate of eighteen (18) working hours for every month of work up to a total of two-hundred and sixteen (216) working hours per year, as long as they work for a minimum of one hundred and forty (140) regular hours per calendar month.

Section 3: Regular workers are entitled to enjoy their vacation leave in accordance with a program which is to be established by the Authority, in which seniority and services needs must be taken into account. To that end applications for regular leave shall be submitted no fewer than fifteen (15) working days in advance of the date said leave begins.

[Five sets of initials appear in the left-hand margin of each page of the original.]

United States District Court
For the District of Puerto Rico
— CERTIFIED —
To be correct translation made and/
or submitted by the interested party
/s/ Thomas H. Kavelin
4/22/94
Certified Court Interpreter
Administrative Office of the
United States Courts

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

No. 93-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,
Petitioner,

v.

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of Puerto Rico, San Juan Division

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN J. POLLAK *
JOHN TOWNSEND RICH

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

JOSE E. CARRERAS ROVIRA

Midtown Building, Suite 206
421 Muñoz Rivera Avenue
Hato Rey, Puerto Rico 00918
(809) 751-8995

NORMAN PIETRI CASTELLON

Apartado 113037
Fernandez Juncos Station
San Juan, Puerto Rico 00908-3037
(809) 725-2030

Attorneys for Respondents

* Counsel of Record

June 30, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF THE CASE	2
1. Background	2
2. The Arbitration Proceeding	3
3. The Puerto Rico Superior Court Review Proceeding	5
4. Denial of Discretionary Review by the Puerto Rico Supreme Court	5
5. Federal Questions Raised for the First Time on Motion for Reconsideration	6
REASONS FOR DENYING THE WRIT	7
I. THE CONSTITUTIONAL QUESTIONS THAT PETITIONER SEEKS TO PRESENT WERE NOT PROPERLY PRESENTED TO THE COURTS OF PUERTO RICO	7
II. PETITIONER'S CONTRACT CLAUSE CONTENTIONS, EVEN IF PROPERLY PRESENTED, DO NOT MERIT REVIEW BY THIS COURT	10
III. PETITIONER'S EX POST FACTO CLAUSE CONTENTIONS, WHICH WERE NOT PRESENTED BELOW, DO NOT MERIT REVIEW	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 6, 9, 11, 13
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988) 9
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 8
Collins v. *Youngblood*, 497 U.S. 37 (1990) 16
De Veau v. *Braisted*, 363 U.S. 144 (1960) 17
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 10, 11, 13, 14
Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) 11, 13
Galvan v. *Press*, 347 U.S. 522 (1954) 16
Garris v. *Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) 15
Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 9
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 11, 13, 14
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994) 17
Minnesota Ass'n of Health Care Facilities, Inc. v. *Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985) 15
Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987) 15
Posadas de Puerto Rico Associates v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) 12
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 6, 9, 11, 14
United States v. *Halper*, 490 U.S. 435 (1989) 17
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 17

CONSTITUTIONAL PROVISIONS:

Puerto Rico Constitution, art. II, § 7 6
U.S. Constitution, art. I, § 9, cl. 3 16
U.S. Constitution, art. I, § 10, cl. 1 ..... 6, 9, 10, 16
U.S. Constitution, amdmt. 5 17

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74, adding Rev. Stat. § 1977A, 42 U.S.C. § 1981a (Supp. IV 1992) 17

Law No. 96 of June 26, 1956, § 27(a), as amended, P.R. Laws Ann. tit. 29, § 246b(a) (1990 Supp.) .. 2, 5, 6, 13

P.R. Laws Ann. tit. 29, § 245*l* (1990 Supp.) 2

Puerto Rico Civil Code, 1930, § 3, P.R. Laws Ann. tit. 31, § 3 (1993) 6

Puerto Rico Law No. 11 of June 2, 1993 (not yet codified) 6

28 U.S.C. § 1258 (1988) 12

48 U.S.C. § 737 (1988) 11

RULES:

Rules of the Supreme Court of Puerto Rico, Rule 45(c) 1

REGULATIONS:

Minimum Wage Board of Puerto Rico, Mandatory Decree No. 38 ..... *passim*

OTHER AUTHORITIES:

Stern, Robert L., *et al.*, *Supreme Court Practice* (7th ed. 1993) 8

Tribe, Laurence E., *American Constitutional Law* (2d ed. 1988) 6, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1902

PUERTO RICO PORT AUTHORITY,
Petitioner,

v.

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of Puerto Rico, San Juan Division

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the Brotherhood of Office and Commercial Workers and the Cataño Transportation Workers Union (the "Unions"), submit this brief in opposition to the petition for a writ of certiorari filed by the Puerto Rico Port Authority ("Port Authority").

JURISDICTION

The Unions agree that the two motions for reconsideration filed in the Supreme Court of Puerto Rico were timely and that the petition for writ of certiorari, filed within 90 days of the denial of the second motion for reconsideration authorized by Rule 45(c) of the Rules of the Supreme Court of Puerto Rico, is timely.

STATEMENT OF THE CASE

This case arises from judicial review of a labor-management arbitration award applying a regulation of the Minimum Wage Board of Puerto Rico to provisions for vacation leave in the collective bargaining agreement between each Union and the Port Authority.

1. Background. Prior to July 6, 1989, the regulation of the Minimum Wage Board of Puerto Rico that was applicable to the transportation industry, the "Seventh Revision" of Mandatory Decree No. 38, required that covered employees earn paid vacation leave at a monthly rate equivalent to 15 days per year. By agreement with the employer, vacation leave could "accrue" for more than a year but not for more than two years.[1] In other words, the employee was entitled to postpone his vacation leave for up to two years after it was earned, but for no longer. Any employee denied compensation, including paid vacation leave, had a statutory right to bring a civil action for the unpaid amount and, if successful, would recover the unpaid amount and, in addition, an amount equal to the unpaid amount. Law No. 96 of June 26, 1956, § 27(a), as amended, P.R. Laws Ann. tit. 29, § 246b(a) (1990 Supp.) (Pet. 33a).

Effective July 6, 1989, after due notice,[2] the Minimum Wage Board amended Mandatory Decree No. 38 in the "Eighth Revision" by, among other things, adding the following paragraph:

---

[1] See Pet. 34a, first paragraph on that page. That paragraph, quoted from the Decree as amended effective July 6, 1989, was essentially identical in the version of the Decree in effect before July 6, 1989. See Pet. 20a.

[2] P.R. Laws Ann. tit. 29, § 245*l* (1990 Supp.) (partially quoted at Pet. 32a), gives employers a minimum of 45 days between notice of a proposed regulation and the effective date of the final regulation. In this case, hearings were announced in March 1989, and the draft Eighth Revision was published on May 11, 1989, almost two months before July 6, 1989.

> "Any employer who does not grant any of his employees the vacation time that he is entitled to after it has been accumulated for two (2) years, must grant him the total accumulated, paying two (2) times the corresponding salary for the period in excess of said two years." Pet. 34a.

The collective bargaining agreements between the Unions and the Port Authority, in effect on July 6, 1989, and during the relevant periods thereafter, provided that employees earned a greater amount of vacation leave each year than required by Mandatory Decree No. 38: 30 days per year for the Brotherhood of Office and Commercial Workers, and 27 days per year for the Cataño Transportation Workers Union. See Pet. 14a-16a. In addition, the agreements allowed employees to "accumulate" or "bank" indefinitely vacation leave in excess of 20 days per year. The employee could use that accumulated vacation leave whenever he or she pleased, and any unused vacation leave would be paid off when the employee retired or resigned. See Pet. 4 & n.7. The Port Authority has taken the position that these agreements complied with Mandatory Decree No. 38.

2. The Arbitration Proceeding. In 1990, the Unions filed grievances under the collective bargaining agreements, contending, among other things, that the Port Authority was acting contrary to Mandatory Decree No. 38 in its treatment of vacation leave. The parties disagreed over (1) what portion of accrued vacation leave must be paid at double pay under the Decree, and (2) whether the double-pay obligation of the Decree applied to vacation days that had accumulated in excess of two years on or at any time after July 6, 1989, or, as the Employer contended, only to vacation days that were earned after July 6, 1989 (so that the double pay obligation could first come into effect two years later, in 1991). See Pet. 15a-21a.

Under the collective bargaining agreements, the issues raised by the grievances were presented to an arbitrator for binding decision. No issue of federal constitutional law was presented or reserved by the Port Authority. The arbitrator ruled partly for the Unions and partly for the Port Authority. Of relevance here, the arbitrator ruled that, under the Decree, double pay was payable on *any* vacation leave accumulated in excess of two years. Pet. 16a-17a. Thus, "[o]nce the employee accrues the maximum [number of days] that may be accrued in two years under the Agreement, he is entitled to double pay for all leave that exceeds the maximum that may be accrued in those two years * * *." Pet. 21a-22a. In addition, the arbitrator rejected the Port Authority's argument that its double pay obligation under the Decree would not apply to any accumulated vacation leave until August 1991, on the ground that such delayed effect could not have been intended by the Minimum Wage Board. Pet. 17a-21a. In doing so, the arbitrator ruled that, under the Seventh Revision of the Decree, in effect prior to July 6, 1989, the Port Authority had been forbidden to allow any vacation leave to accrue for more than two years. Pet. 20a.

Thus, the Port Authority errs in repeatedly stating (Pet. 9, 11, 13, 16-17, 18, 24) that before July 6, 1989, "the law permitted" the contractual arrangements under which employees could accumulate or "bank" vacation days in excess of the days required by the Decree.[3] And the Port Authority also errs in taking the position (Pet. 6 n.8, 9, 14, 18, 22, 25), that the Eighth Revision requires double pay for improperly accumulated vacation days *in addition to* the single pay already required by the Decree and the collective bargaining agreements. As interpreted by the arbitrator, the Decree simply requires double pay instead of single pay. Thus, the *new* payment required by the

---

[3] As we explain below (p. 12 & nn.10-11, p. 15 n.14), the Port Authority's mischaracterization of the arbitrator's ruling permeates its argument for certiorari.

revised Decree is another day's pay—not double pay or triple pay in addition to a day's pay, as the Port Authority suggests.

The arbitrator also ruled (Pet. 22a & n.19) that the Port Authority must pay the penalty imposed by Law No. 96 of June 26, 1956, § 27(a), as amended, which applies whenever an employer's conduct forces employees to litigate their wage and hour rights. See p. 2 *supra*. The application of that law doubled the Port Authority's obligation from double pay for each day of vacation improperly accumulated in excess of two years to four days' pay.

3. The Puerto Rico Superior Court Review Proceeding. The Port Authority sought vacation of the arbitration award by filing suit in the Superior Court of Puerto Rico. With respect to the alleged retroactive effect of the Decree, it argued, again, that its obligation to pay double for excess annual leave should not begin until August 1991, two years after the effective date of the revised Decree. See Pet. 2a. The Superior Court affirmed the arbitration award, relying on the arbitrator's ruling that accumulations in excess of two years had been in violation of the public policy of the Decree even before the 1989 revision. Pet. 2a-4a. The Port Authority made no argument based on federal constitutional law, and the Superior Court decision does not address any such issues.

4. Denial of Discretionary Review by the Puerto Rico Supreme Court. The Port Authority filed a timely petition for discretionary review in the Supreme Court of Puerto Rico. It is undisputed that the Port Authority made no arguments based on federal constitutional law in that petition. Instead, the Port Authority's arguments were based entirely on Puerto Rico law.

The Supreme Court of Puerto Rico denied the Port Authority's petition for discretionary review. Pet. 24a. In doing so, the Supreme Court briefly described its rea-

sons, as required under a then-recent law.[4] As to the Port Authority's contention that the Puerto Rico Civil Code prohibited any retroactive application of the Mandatory Decree,[5] the Court noted that it had held in 1973 and 1983 that this provision was "a general rule of interpretation and not a 'principle of inflexible application.'" Pet. 24a. The Court further observed that the penalty of revised Mandatory Decree No. 38 "advances and is in consonance with the public policy." Pet. 25a. With respect to the Port Authority's contention that the double penalty imposed by Law No. 96 of June 26, 1956, was impermissible under Puerto Rico law, the Court observed that the penalty was clearly applicable. Pet. 25a-26a.

5. Federal Questions Raised for the First Time on Motion for Reconsideration. The Port Authority then filed with the Supreme Court of Puerto Rico a timely motion for reconsideration of the denial of review. Pet. 35a-39a. This motion, as the Port Authority states (Pet. 7-8), contended that Mandatory Decree No. 38 violated Article II, § 7, of the Puerto Rico Constitution ("No laws impairing the obligation of contracts shall be enacted."), and Article I, § 10, of the U.S. Constitution. The motion (at Pet. 39a) cited *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); and Laurence E. Tribe, *American Constitutional Law* 617 *et seq.* (2d ed. 1988), the principal authorities concerning the Contract Clause upon which the Port Authority now relies. There was no mention of the prohibition against *ex post facto* laws in Article I, § 10, of the U.S. Constitution and no citation to cases concerning that pro-

---

[4] Law No. 11 of June 2, 1993 (not yet codified).

[5] Section 3 of the Puerto Rico Civil Code, 1930, P.R. Laws Ann. tit. 31, § 3 (1993), provides: "Laws shall not have a retroactive effect unless they expressly so decree."

vision. The Puerto Rico Supreme Court denied the motion by order. Pet. 28a.

As permitted by the Rules of the Puerto Rico Supreme Court, the Port Authority then filed a second motion for reconsideration (Pet. 40a-43a), citing the same provisions and the same authorities. The Puerto Rico Supreme Court again denied the motion by order. Pet. 29a.

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTIONAL QUESTIONS THAT PETITIONER SEEKS TO PRESENT WERE NOT PROPERLY PRESENTED TO THE COURTS OF PUERTO RICO.

As set forth above in the Statement of the Case, the Port Authority did not raise the federal constitutional questions it seeks to present here in the arbitration proceeding or in the only court to issue a decision on the merits: the Puerto Rico Superior Court.

Nor did the Port Authority raise the federal constitutional questions in its petition for discretionary review in the Puerto Rico Supreme Court, which, in any event, refused to hear the case.

The Port Authority's position appears to be that the federal questions were properly presented below because they were raised, for the first time, in the Port Authority's motion for reconsideration of the Puerto Rico Supreme Court's refusal of discretionary review and because, under Puerto Rico law, "a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below." Pet. 7-8 & n.11 (citing five cases of the Puerto Rico Supreme Court).

The Port Authority's position is wrong for several reasons. None of the cases that the Port Authority cites discuss the raising of constitutional questions for the first

time on a motion for reconsideration in the Puerto Rico Supreme Court. Thus, these cases do not in any way show that the Puerto Rico Supreme Court entertains constitutional questions raised for the first time at such a late date.

In any event, even if the Puerto Rico Supreme Court might consider it appropriate, in some cases, to entertain constitutional questions raised for the first time on motion for reconsideration, in this case that Court denied both motions for reconsideration by order. Thus, there is no evidence in the record that the Puerto Rico Supreme Court did entertain the Port Authority's constitutional arguments on the merits.

The failure of the Puerto Rico Supreme Court to grant either motion for reconsideration and thus to entertain and rule on the newly-raised federal questions is a sufficient reason for this Court to deny certiorari. "Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question." Robert L. Stern *et al., Supreme Court Practice* 127 (7th ed. 1993) (citing cases). That did not occur here.

This is not a case in which the federal question "is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question * * *." *Id.* at 129 (citing *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930)). The federal questions were apparent, at least after the ruling by the arbitrator, and the Port Authority argued against the application of the revised Decree to vacation leave accrued before 1989 both in the Puerto Rico Superior Court and in its petition for discretionary review in the Puerto Rico Supreme Court. It did so, however, only on the basis of Puerto Rico law. Moreover, it cannot have been "unexpected" that the Puerto Rico courts would affirm or de-

cline to overturn the award of a labor arbitrator. Finally, when the Port Authority did raise its federal constitutional claims, in the motions for reconsideration filed with the Puerto Rico Supreme Court, it relied on *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978)—decisions that were available to it at the beginning of this litigation.[6]

It is true that this Court has, on rare occasions, considered on writ of certiorari a federal question raised for the first time in a petition for rehearing that was denied without comment by a state supreme court. *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-65 (1982). Nevertheless, where the late raising of the federal issue results in the absence of "a well-developed record and a reasoned [state court] opinion on the merits" of the federal question, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 79, 80 (1988), prudential considerations counsel strongly against the granting of certiorari.[7]

---

[6] While the Port Authority's motions for reconsideration did raise, for the first time, an issue under that part of the first sentence of Article I, § 10, of the U.S. Constitution dealing with the obligation of contracts (the "Contract Clause") by citing two Supreme Court cases addressing that clause, those motions cannot fairly be read as separately raising an issue concerning that part of the same sentence of Article I, § 10, dealing with *ex post facto* laws. The words *"ex post facto"* were not used, and none of the leading cases concerning the Ex Post Facto Clause were cited. A "vague appeal to constitutional principles" in a petition for rehearing below does not properly raise a federal constitutional issue, and language sufficient to invoke one provision of the Constitution may be "too oblique" to support a conclusion that another provision has been invoked. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77 (1988).

[7] In *Hathorn* v. *Lovorn*, *supra*, while the federal question (relating to the Voting Rights Act) had been first raised in a petition for rehearing to the Mississippi Supreme Court, that court had remanded the case for further proceedings on other grounds, and, on remand, the lower state court entertained the federal question

The Port Authority had every opportunity to present its constitutional claims in a timely manner below, but instead litigated its case on the basis of Puerto Rico statutory law. No good purpose would be served by this Court considering on the merits, in response to the Port Authority's last-minute change in its litigation strategy, whether to reverse the Puerto Rico courts on issues that were not presented until after denial of discretionary review by the Puerto Rico Supreme Court and thus were not addressed by the arbitrator or by any court below.

The Port Authority's failure to present its federal questions properly below is a sufficient basis for denying certiorari in this case. We show below that, in any event, those federal questions do not merit this Court's plenary consideration.

II. PETITIONER'S CONTRACT CLAUSE CONTENTIONS, EVEN IF PROPERLY PRESENTED, DO NOT MERIT REVIEW BY THIS COURT.

The only federal question presented at any time to any court below concerned the Contract Clause. As we show below, the Port Authority's attempts to show that the decisions below conflict with the decisions of this Court rely on contentions respecting Puerto Rico law that were lost below and do not raise any issue meriting review by this Court.

Although the language of the Contract Clause—"No State shall * * * pass any * * * Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10, cl. 1—is facially absolute, this Court has recognized that "its prohibition must be accommodated to the inherent police power of the State." *Energy Reserves Group, Inc.* v.

---

and issued two decisions on the application of the Voting Rights Act to the case at hand. Thus, in contrast to this case, *Hathorn* presented a federal question that, by the time this Court granted certiorari, had been fully litigated and decided in the lower state court, though not in the state supreme court.

Kansas Power & Light Co., 459 U.S. 400, 410 (1983). The first question is whether a State law operates as "a substantial impairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978).[8] Even if it does, a State may justify such impairment upon a showing of "a significant and legitimate public purpose," where the legislature's " 'adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." ' " *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987) (quoting *Energy Reserves Group*, 459 U.S. at 412, and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)). The Port Authority cannot demonstrate that the courts of Puerto Rico failed to apply or improperly applied these tests, because the late raising of the federal question meant that it was never addressed below. Nor can it demonstrate that the rulings are necessarily so erroneous that certiorari should nevertheless be granted.

(a) In considering whether a state law meets the initial test of "a substantial impairment of a contractual relationship," this Court relies heavily on the extent to which the conduct covered by the law has been regulated in the past.[9] In *Allied Structural Steel*, the case on which

---

[8] While Puerto Rico is not a State, the "rights, privileges, and immunities of citizens of the United States" are respected in Puerto Rico "to the same extent as though Puerto Rico were a State of the Union * * *." 48 U.S.C. § 737 (1988).

[9] *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 194 & n.14 (1983) (state law increasing oil and gas tax and prohibiting producers from passing increase to customers did not substantially impair producers' obligations under sale contracts where oil and gas industry was already "subject to heavy regulation"); *Energy Reserves Group*, 459 U.S. at 411, 413-16 & n.18 (state law imposing price controls on intrastate natural gas market did not substantially impair obligations under gas purchase contracts where state had long regulated other aspects of the natural gas industry).

the Port Authority principally relies, the Court stressed that the pension plan obligations imposed by the state law were "totally unanticipated" and that the state had not previously regulated the private pension plan field. 438 U.S. at 249.

This consideration points here strongly in the Unions' favor, because the Port Authority's contractual obligations with regard to vacation time were heavily regulated prior to July 6, 1989. Indeed, contrary to the Port Authority's repeated statements that its contractual obligations were substantially impaired because "the law permitted" its conduct before July 6, 1989 (Pet. 9, 11, 13, 16-17, 18, 24), Puerto Rico had previously proscribed accumulation of vacation time for more than two years, and even provided a penalty whenever a civil action was required.[10] The effect of the revised Decree at issue here was merely to impose an obligation of double pay on excess accumulated vacation leave where, even under the prior Decree, the employees would have been entitled to immediate use of their accumulated vacation time at single pay.[11] The Port Authority was clearly on notice that its

---

[10] As explained in the Statement of the Case, the Port Authority's repeated claim that its conduct before July 6, 1989, was "permitted by law," misreads the decisions of the arbitrator and of the lower court. The ruling of the aribtrator that the public policy of the Decree, even before 1989, prohibited the accumulation of vacation leave for more than two years was an interpretation of Puerto Rico law that was not disturbed by the Puerto Rico courts. Its correctness is not subject to review in this Court. See 28 U.S.C. § 1258 (1988); *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 n.6 (1986) ("A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico.").

[11] The Port Authority also claims "substantial impairment" because it became obliged to pay "*three times* the amount that it * * * had agreed would be paid for vacation days that employees elected to bank." Pet. 14 (emphasis in original). See also Pet. 18. As we have explained in the Statement of Facts, the additional

"contractual rights were subject to alteration" by further regulation. See *Energy Reserves Group*, 459 U.S. at 416. No case cited by the Port Authority suggests that this Court, or any court, would find the change that occurred to be the kind of "substantial impairment" that triggers application of the Contract Clause.

(b) Even if "substantial impairment" could be found, the Port Authority has failed to demonstrate that the Decree at issue here would violate the Contract Clause. Even substantial impairment of contractual obligations is justified when the law that caused the impairment serves "a significant and legitimate public purpose," *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505, as opposed to "providing a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. Thus, the state law invalidated in *Allied Structural Steel* was not enacted to meet "an important general social problem," but instead "had a very narrow focus" and "may have been directed at one particular employer." *Energy Reserves Group*, 459 U.S. at 412 n.13 (discussing *Allied Structural Steel*). And in upholding state laws against Contract Clause challenges in the years since *Allied Structural Steel*, this Court has relied on the fact that the laws were not "special interest legislation." [12]

---

obligation of double the amount required by the revised Decree at issue here stems from the application of the 1956 Puerto Rico law that penalizes employers that force their employees to litigation. The application of that old law cannot be laid at the feet of the Decree at issue here.

[12] See *Exxon*, 462 U.S. at 191-92 (upholding law that prohibited oil and gas producers from passing tax increase to customers because state had legitimate public interest in protecting consumers from the tax increase, and law "applied to all oil and gas producers," and thus "imposed a generally applicable rule of conduct"); *Energy Reserves Group*, 459 U.S. at 416-17 & n.25 (upholding law that imposed natural gas price controls because state had legitimate public interest in protecting consumers and coordinating interstate and intrastate markets, and there was little or no evidence that the law was "special interest legislation").

These cases also point strongly in favor of the decisions below. The Decree at issue here applies to all employers of transportation workers in Puerto Rico and thus is presumptively a valid exercise of the Commonwealth's power to regulate the wages and hours of its workers.

(c) In the last step of the Court's Contract Clause analysis, courts should " 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure,' " *Energy Reserves Group*, 459 U.S. at 413 (quoting *United States Trust Co.*, 431 U.S. at 22-23), "unless the State is itself a contracting party." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505.

Under these cases, deference to Puerto Rico's judgment is appropriate. The reservation in the *Keystone* passage about contracts in which a State is a party is designed not to protect the State from itself—which is entirely unnecessary—but to protect parties who have contracted with the State from laws that reduce the State's obligations.[13] Here, while the Port Authority is a public corporation and thus may be considered the Commonwealth for some purposes, the Decree at issue *increases* the Port Authority's obligations. Accordingly, the deferential standard of review required by *Keystone* and *Energy Reserves Group* would be given the Decree in this case.

Under the required deferential standard of review, the decision below would pass muster. State laws with more severe "retroactive" effect have been upheld by this Court. See *Keystone Bituminous Coal Ass'n*, 480 U.S. at 486, 506 (upholding law that prevented coal mine operators from holding surface estate owners to their contractual

---

[13] See *United States Trust Co.*, where the Court invalidated a New Jersey law that retroactively repealed a covenant between New Jersey and New York, thereby impairing New Jersey's own financial obligations to bondholders who relied on a provision in the covenant and noted that "complete deference" to the state's legislative judgment was "not appropriate because the State's self-interest [was] at stake." 431 U.S. at 26.

waivers of liability because state had legitimate public interest in preventing surface damage and statute was not enacted solely for private property owners' benefit).[14]

(d) Although the Port Authority cites several cases from the federal courts of appeals (Pet. 18 & 21 n.22), it does not claim that there is a conflict among the circuits. Nor is the outcome of the present case in conflict with the lower court cases cited by the Petitioner.[15] None

---

[14] The Port Authority suggests that the only purpose of the 1989 revision of the Decree was to remedy the problem of employers who did not permit their employees to take even the vacation leave mandated by the Decree itself or who permitted employees to "bank" such mandated vacation time, a purpose not relevant to the Port Authority. Pet. 19. This contention, once again, ignores the fact that the arbitrator ruled that the public policy of the Decree, even before revision, was that *no* vacation time could be accumulated for more than two years and that the Port Authority had violated that policy. Moreover, here again the Port Authority contends that the effect of the revised Decree is unreasonable because it imposes "a penalty of *three days' pay* for every day of vacation in excess of 60 banked prior to July 6, 1989." Pet. 22 (emphasis added). As explained above (pp. 4-5 & p. 12 n.11), the "penalty" of the Decree itself is a single day's pay.

[15] In *Garris* v. *Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980), in contrast to the present case, the contractual relationship had not previously been regulated by the state, 630 F.2d at 1007, and the interest being furthered by the provision at issue was private rather than public, *id.* at 1010-11. In *Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985), the court invalidated a portion of a state statute that required restitution for prior, formerly legal, conduct, and, in contrast with the present case, the retroactive liability was "totally unexpected." *Id.* at 451. In *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987), the court invalidated a state statute abolishing the "borrowed employee" defense to tort actions, insofar as it applied to pending cases, because, in contrast with the present case, the retroactivity provision was special interest legislation, specifically designed to change the outcome of the *Nieves* plaintiffs' pending cases and thus could "hardly be viewed as general legislation for the public welfare." *Id.* at 1250.

of those cases demonstrates that the decision of the arbitrator would or should have been struck down had the Port Authority raised its Contract Clause arguments in a timely fashion.

For all of these reasons, the Port Authority has not demonstrated that the Decree as applied below violates the Contract Clause or that this Court should review a constitutional question that was not addressed in this case by any Puerto Rico court.

III. PETITIONER'S EX POST FACTO CLAUSE CONTENTIONS, WHICH WERE NOT PRESENTED BELOW, DO NOT MERIT REVIEW.

As we have explained above (p. 9, n.6), no argument was made to the Puerto Rico courts at any time concerning the Ex Post Facto Clause. But even if this Court were to find such a contention implicit in the Contract Clause citations that were belatedly presented, there is no Ex Post Facto Clause issue that merits review.

This Court has recently reaffirmed its longstanding view that the Ex Post Facto Clause—"No State shall * * * pass any * * * ex post facto Law," U.S. Const. art. I, § 10, cl. 1—is limited to criminal laws. "Legislatures may not retroactively alter the definition of *crimes* or increase the punishment for *criminal* acts." *Collins* v. *Youngblood*, 497 U.S. 37, 38 (1990) (emphasis added). See also *Galvan* v. *Press*, 347 U.S. 522, 531 & n.4 (1954) (refusing to apply the federal Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, to deportation law and noting that the Court "has undeviatingly enforced" the position that the Clause applies only to crimes); Laurence E. Tribe, *American Constitutional Law* 635 (2d ed. 1988) (by the early twentieth century, the Court reached "consensus in favor of the narrower view that only criminal punishment is prohibited by the ban [on *ex post facto* laws]").

The Port Authority primarily relies on this Court's recent decision in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994), where the Court observed, in connection with the punitive damage provision of § 102 of the 1991 Civil Rights Act, that "[r]etroactive imposition of punitive damages would raise a serious constitutional question," and cited several cases that discuss issues concerning *ex post facto* laws. In context, the Court does not appear to have been suggesting that retroactive imposition of punitive damages might *violate* the Ex Post Facto Clause, contrary to its recent decisions, but that, by *analogy* to the Ex Post Facto Clause, such imposition of punitive damages would raise a constitutional question —most likely under the Due Process Clause, which the Port Authority has never raised.[16]

The Port Authority makes no claim that there is a conflict in the circuits on the application of the Ex Post Facto Clause to civil cases. Insofar as we have been able to determine, there is none.

Under the circumstances, the Port Authority's contention that the Decree violates the Ex Post Facto Clause does not merit review by this Court.

---

[16] Of the three other Supreme Court cases cited by the Port Authority (Pet. 23), *United States* v. *Halper*, 490 U.S. 435 (1989), concerned only the Double Jeopardy Clause of the Fifth Amendment, and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), concerned only the Due Process Clause of the Fifth Amendment. Neither construed the Ex Post Facto Clause. The other case, *De Veau* v. *Braisted*, 363 U.S. 144 (1960), which concerned a criminal statute, does not state that the Clause applies in civil proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN J. POLLAK *
JOHN TOWNSEND RICH

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

JOSE E. CARRERAS ROVIRA

Midtown Building, Suite 206
421 Muñoz Rivera Avenue
Hato Rey, Puerto Rico 00918
(809) 751-8995

NORMAN PIETRI CASTELLON

Apartado 113037
Fernandez Juncos Station
San Juan, Puerto Rico 00908-3037
(809) 725-2030

Attorneys for Respondents

* Counsel of Record

June 30, 1994

No. 93-1902

(3)

Supreme Court, U.S.
FILED
JUL 29 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,

Petitioner,

—v.—

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

PETITIONER'S REPLY BRIEF

CAROLE O'BLENES
Counsel of Record
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

DANIEL R. DOMINGUEZ
DOMINGUEZ & TOTTI
416 Ponce de Leon Avenue
Hato Rey, Puerto Rico 00918
(809) 753-7910

Attorneys for Petitioner

SAUL G. KRAMER
WENDY L. KORNREICH
Of Counsel

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
A. Both Questions Presented Were Timely And Adequately Raised Below	3
B. The Retroactive Penalty Provision Of The Decree Is An Unconstitutional Impairment Of The Parties' Bargained For Labor Contracts	5
C. The Retroactive Penalty Provision Unconstitutionally Penalizes The Port Authority For Past Conduct	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page(s)
Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978)	5-8
Associated Builders and Contractors v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991)	7-8
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	5
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)	7
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	7-8
Garris v. Hanover Insurance Company, 630 F.2d 1001 (4th Cir. 1980)	7
Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	5
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	7
Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994)	5, 9
Molina v. U.R.H.C., 114 P.R.R. 382 (1983)	5
Pacheco v. Srio. Instrucción Pública, 108 P.R.R. 629 (1979)	5

Page(s)

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 5

Santiago Cruz v. Hernández Andino, 91 P.R.R. 688 (1965) 4

United States v. Halper, 490 U.S. 435 (1989) 9

Vélez Ramírez v. Romero Braceló, 112 P.R.R. 902 (1982) 5

STATUTES

P.R. Laws Ann. tit. 4, Appendix 4

P.R. Laws Ann. tit. 29, § 246(b) 2

MISCELLANEOUS

Robert L. Stern *et al.*, *Supreme Court Practice* (7th ed. 1993) 5

PETITIONER'S REPLY BRIEF

Petitioner, Puerto Rico Port Authority (the "Port Authority"), submits this memorandum in further support of its petition for a writ of certiorari to review the judgment of the Superior Court of Puerto Rico, San Juan Division, and in reply to the opposing brief of the Brotherhood of Office and Commercial Workers and Cataño Transportation Workers Union (the "Unions").

ARGUMENT

It bears emphasis at the outset that the critical points underlying this dispute have been and remain uncontroverted:

- The collective bargaining agreements between the Port Authority and the Unions (the "Labor Contracts") "provided that employees earned a greater amount of vacation leave each year than required by Mandatory Decree No. 38" (Resp. 3);[1]
- No Port Authority employee was ever prevented from taking the minimum number of vacation days required by Mandatory Decree No. 38 (the "Decree") (Pet. 6 n.9);
- Under the Labor Contracts, employees were entitled to accumulate or "bank" without limitation—for later use or for liquidation in cash upon termination of employment—only vacation days granted them under the Labor Contracts *in excess of* the vacation days required by the Decree (Resp. 3); and
- Prior to the 1989 amendment of the Decree, there was no authority that allowing the unlimited accumulation of *excess* vacation days violated the Decree; indeed, the Solicitor of Labor of Puerto Rico had ruled that employers were free to

---

[1] The pages of the Port Authority's Petition for a Writ of Certiorari are referred to as "Pet. __"; and the pages of the Unions' Brief in Opposition are referred to as "Resp. __."

determine the form and manner of granting such vacation days (Pet. 48a).[2]

Thus, it is clear that the Amended Decree, as construed below, retroactively and punitively penalizes the Port Authority for action that it was obligated to take under the Labor Contracts—*i.e.*, allowing employees to bank excess vacation without limitation. It is equally clear, despite the Unions' semantics,[3] that the penalty substantially impairs the rights of the Port Authority under the Labor Contracts by requiring it to pay for banked vacation days (in excess of those earned in two years) three times or, according to the Unions, four times[4] what it agreed in collective bargaining to pay.

---

[2] The Unions simply ignore this long-standing position of the Puerto Rico Department of Labor, which was reaffirmed after the 1989 amendment of the Decree. (*See* Pet. 16-17 & n.19, 44a, 48a.) In that regard, we note that the Port Authority does not ask the Court to decide a question of Puerto Rican law as the Unions suggest. (Resp. 12 n.10) Rather, the Department of Labor rulings constitute the regulatory backdrop against which the Port Authority entered into the Labor Contracts. Until the 1992 arbitration award at issue here, there was no reason for the Port Authority to believe that any provision of the Decree applied to vacation days in excess of the minimum number required by the Decree.

[3] Respondents contend that the Decree "simply requires double pay instead of single pay" and that the balance of the penalty imposed on the Port Authority is attributable to the operation of Law No. 96 of 1956, as amended. (Resp. 4-5) The fact remains, however, that but for the enactment of the penalty provision of the Decree, there would be no penalty applicable to the Port Authority to which Law No. 96 could be applied. *See* P.R. Laws Ann. tit. 29, § 246(b) (Pet. 33a). Leaving semantics aside, the real effect of the penalty provision of the Decree is to require the Port Authority to pay three days' pay for each day of vacation banked in excess of the number of vacation days earned in two years even if the vacation was banked before July 6, 1989: (a) one day's pay for each such vacation day, plus (b) a penalty of one day's pay under the new penalty provision of the Decree, plus (c) a third day's pay by operation of Law No. 96, which doubles the one-day penalty imposed by the Decree.

[4] Respondents argue that the application of Law No. 96 would "double[] the Port Authority's obligation from double pay for each day of vacation

(continued...)

The retroactive application of this penalty, moreover, does not further the articulated public purpose of the penalty provision of the Decree, for no Port Authority employee was "kept from taking his annual leave for over two years." (Pet. 7, 4a)

In these circumstances, it is evident that the judgment below is in conflict with the decisions of this Court applying the Contract Clause and the Ex Post Facto Clause of Article I, Section 10. Nor should the Unions' procedural argument (Resp. 7-10) be permitted to obscure the appropriateness of a writ of certiorari here. Both questions presented by the petition were timely raised below as a matter of Puerto Rican law and the Unions have cited no authority whatsoever to the contrary. Both the Contract Clause and Ex Post Facto Clause issues were properly and adequately raised as a matter of federal law as well. As the Unions concede, in appropriate circumstances, the Court has "considered on writ of certiorari a federal question raised for the first time in a petition for rehearing that was denied without comment by a state supreme court." (Resp. 9) Precisely such appropriate circumstances are presented here.

Certiorari should therefore be granted in order to address and correct the retroactive—and punitive—enlargement of the Port Authority's obligations under the Labor Contracts.

A. Both Questions Presented Were Timely And Adequately Raised Below.

As set forth in the petition, under Puerto Rican law, a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below. *See* Pet. 8 n.11. The Unions apparently concede that point but argue that the cases relied on by the Port Authority do not

---

[4](...continued)

improperly accumulated . . . to four days' pay." (Resp. 5) The Port Authority vigorously disagrees with that interpretation but notes that, even if it were correct, it would simply result in a more oppressive and even more obviously punitive penalty.

address the precise circumstance of raising a new question on motion for reconsideration. (Resp. 7-8) However, they cite no authority establishing, or even suggesting, that a legal question may not be raised for the first time on such a motion. This is not surprising, for the Supreme Court of Puerto Rico has repeatedly eschewed wooden application of procedural rules and emphasized that cases should be decided on the merits. As the Supreme Court of Puerto Rico stated nearly three decades ago,

> [W]e must discard the outmoded theory that an appellant may never change, on appeal, his theory of the case. We stated that such theory constitutes only a ritual which is inconsistent with the need of deciding the cases on the merits.

Santiago Cruz v. Hernández Andino, 91 P.R.R. 688 (1965); *see also* Pet. 8 n.11 and cases cited therein.

Furthermore, Rule 45 of the Rules of the Supreme Court of Puerto Rico permits the filing of two motions for reconsideration *as of right* prior to the issuance of the mandate. P.R. Laws Ann. tit. 4, Appendix IA. No limitation is stated in those Rules on the raising of any legal question for the first time on such a motion. Thus, as a matter of Puerto Rican law, under the Rules of the Supreme Court of Puerto Rico and its decisions, the questions presented were timely raised below.

They were also timely and adequately raised as a matter of federal law. This is so because, in rejecting the Port Authority's petition for review, the Supreme Court of Puerto Rico unexpectedly declined to apply a well-established and "general rule of interpretation," embodied in Article 3 of the Civil Code of Puerto Rico, "which prohibits the retroactive application of the laws." (Pet. 24a) Given the unanticipated nature of that ruling, the motion for reconsideration was the first opportunity for the Port Authority to raise the federal constitutional questions arising from the ruling

and the Port Authority took that opportunity.[5] In analogous circumstances, this Court has recognized that federal claims have been adequately presented even though not raised in the lower court or, in the first instance, before the highest state court. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *see also* Robert L. Stern *et al.*, *Supreme Court Practice*, 129 & n.43 (7th ed. 1993) and cases cited therein.

Furthermore, the Ex Post Facto Clause, as well as the Contract Clause, was raised by the Port Authority's argument below based on Article I, Section 10, of the Constitution. The Port Authority objected below to the penalty imposed upon it on the same basis as it does before this Court—that the penalty "retroactively penalizes" it in violation of Article I, Section 10, of the Constitution, which includes the Ex Post Facto Clause.[6] As this Court has recognized, there is a unifying theme in the clauses contained in that section, specifically the Contract and Ex Post Facto Clauses, in their protection against retroactive state action. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497 (1994).

B. The Retroactive Penalty Provision Of The Decree Is An Unconstitutional Impairment Of The Parties' Bargained For Labor Contracts.

As set forth in the petition, this Court's decision in *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234 (1978), is controlling here. The judgment below is clearly in derogation of the

---

[5] It also bears emphasis that the Supreme Court of Puerto Rico has repeatedly ruled that all statutory issues should be exhausted before constitutional questions are addressed. *Molina v. U.R.H.C.*, 114 P.R.R. 382, 384-85 (1983); *Vélez Ramírez v. Romero Barceló*, 112 P.R.R. 902, 918 (1982); *Pacheco v. Srio. Instrucción Pública*, 108 P.R.R. 629 (1979).

[6] This is not a case where the petitioner merely "invok[ed] the Constitution in state court and await[ed] review in this Court to specify the constitutional provision it is relying upon"; nor did the Port Authority rely below on any generalized reference to "constitutional principles." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

teaching of *Allied* that a state may not enact legislation that substantially alters the relationship between employer and employee by "superimposing . . . obligations . . . conspicuously beyond those that [the employer] had voluntarily agreed to undertake." 438 U.S. at 240; *see also* Pet. 14-18.

The Unions incorrectly assert that the prior regulation of vacation leave protects the retroactive application of the subsequently-enacted penalty from constitutional scrutiny under *Allied* and this Court's subsequent Contract Clause decisions. (Resp. 11-13) What the Unions ignore, however, is that the prior regulation pertained to *statutorily-mandated* vacation days.[7] Regulation of the additional, collectively-bargained days, truly was unanticipated and has resulted in "a completely unexpected liability in potentially disabling amounts." *Allied*, 438 U.S. at 247.

With the regulatory background that existed prior to July 1989, the Port Authority simply could not have foreseen an attempt to alter retroactively the carefully negotiated balance of obligations—beyond those already imposed by law—that the Labor Contracts represent. This is especially so in light of the well-recognized policies that favor collectively-bargained arrangements. *See, e.g.*, Pet. 12a-13a ("'*The importance that the collective bargaining agreement has in the labor field can hardly be overestimated*. . . . [T]he collective bargaining agreement is a mechanism that, as such, *has force of law between the undersigned parties* as long as it does not violate the laws, morals or public order.'"). Indeed, this case presents even more compelling

---

[7] Contrary to the Unions' assertions (Resp. 12 & n.10, 15 n.14), the Port Authority has not mischaracterized the arbitrator's ruling; nor is it error to state that the law in effect before July 6, 1989, permitted the banking of vacation in excess of that required by the Decree. *See* Pet. 16-17 & n.19. The Unions' misperceptions in that regard appear to rest on a failure to distinguish between mandated and collectively bargained vacation days, a misreading of the decisions of the arbitrator and the Superior Court and/or a misunderstanding of the articulated purpose of the penalty provision of the Decree. (*See* pp. 8-9, *infra*.)

circumstances than did *Allied* for upholding settled contractual expectations because the Decree truly would force the Port Authority to "exceed [its] *bargained-for* expectations." *Allied*, 438 U.S. at 246 n.18 (emphasis added).

Similarly, the interference at issue here—which affects transportation industry employers like the Port Authority who agreed to provide vacation in excess of the statutory minimum and to allow the "banking" of such leave—is hardly a "generally applicable rule of conduct," like those upheld by the Court in the cases cited by the Unions. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983) (cited in Resp. 12 n.12). In *Exxon*, as well as the other cases relied on by the Unions, the challenged legislation was sustained based upon a broad social policy it furthered. *See Exxon*, 462 U.S. at 191 (challenged statute "protect[ed] consumers from excessive [oil and gas] prices"); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 417 (1983) (challenged statute designed to "protect consumers from the escalation of natural gas prices caused by deregulation"); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504-05 (1987) (regulations requiring certain amounts of coal to remain in the ground, unmined, necessary to prevent potential destruction of thousands of structures throughout state).

The Unions' attempt to distinguish the lower court authority relied on by the Port Authority fails for the same reason. It is not correct that the interests furthered by the Decree are of a broad nature, in contrast to the interests served where retroactive legislation has been struck down. To the contrary, the Decree serves the interests of a defined class of employees by directly intervening in their relationship with their employers. Thus, as in *Garris v. Hanover Insurance Company*, 630 F.2d 1001 (4th Cir. 1980), the state is retroactively—and unconstitutionally—impairing a private contractual relationship for the sole benefit of one of the parties to that contract. Also particularly apposite is *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991), which the Unions entirely failed to address, where the court

found that the challenged statute violated the Contract Clause because (like the Decree) it impaired the terms of a collective bargaining agreement by raising the employers' obligations after the fact. (Pet. 14)

Unlike the decisions relied on by the Unions, *Allied* speaks directly to the relationship between an employer and its employees—specifically addressing the obligations of the former to the latter—and to the limits upon a state's interference in that relationship to expand the employer's obligations. In *Exxon*, this Court held that where the impairment of private contracts is incidental to the main effect of the challenged legislation (*e.g.*, "shielding consumers from the burden of the tax increase") then there is no Contract Clause violation. 462 U.S. at 192. On the other hand, it recognized, where the sole effect is to "'adjust[] the rights and responsibilities of contracting parties,'" the state legislation is invalid under the Contract Clause. *Id.* (quoting *Allied*, 438 U.S. at 244). The instant case falls squarely in the latter category.

Finally, the Unions do not even purport to demonstrate any reasonable and necessary relationship between retroactive application of the penalty provision to the Port Authority and the articulated public purpose of the penalty. Instead, they distort the public purpose, to the extent that they address it at all.

As articulated by the courts below and the arbitrator, the public policy underlying the penalty provision of the Decree is not "that *no* vacation time could be accumulated for more than two years." (Resp. 15 n.14) Rather, in the words of the Supreme Court of Puerto Rico, the public policy is "that no employee works more than two years without enjoying his vacations." (Pet. 25a) *See also* Pet. 4a (Superior Court describing arbitral award as "consonant with and in support of public policy that no employee should be kept from taking his annual leave for over two years"); Pet. 16a (arbitrator referring to public policy as "encourag[ing] that an employee not work over two years without taking a break for a well-deserved rest").

Yet, it is uncontroverted that no Port Authority employee was prevented from taking his vacation (or allowed to bank all his vacation) for even one year, let alone two years. To the contrary, employees were permitted to bank only "vacation leave in excess of 20 days per year" (Resp. 3) and thus were required to take at least 20 days of vacation each year—a number that exceeded the minimum number of vacation days required by the Decree. Accordingly, there has been no showing, nor could there be, that retroactive application of the penalty provision of the Decree fosters its stated public purpose.

C. The Retroactive Penalty Provision Unconstitutionally Penalizes The Port Authority For Past Conduct.

The Unions' response to the Port Authority's reliance on the Ex Post Facto Clause is unavailing as well. Indeed, the cases cited by the Unions do not even address the vital issue here: the imposition of civil damages that are penal in nature on the basis of prior conduct. As demonstrated in the petition, the penalty imposed by the Mandatory Decree is penal in nature—serving the "'twin aims of retribution and deterrence'" that brand a punishment as such. Pet. 24-25 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)). And, as this Court observed in *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1505 (1994), "[r]etroactive imposition of punitive damages would raise a serious constitutional question."

The Unions' suggestion that this Court's admonition in *Landgraf* referred to the Ex Post Facto clause merely by way of analogy (Resp. 17) merits little response. The Court not only accompanied its admonition with citations to cases discussing the Ex Post Facto Clause but also chose to quote from the sections of those cases specifically discussing the Ex Post Facto Clause. *See Landgraf*, 114 S. Ct. at 1505 ("*De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ('The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts'). See also *Louis Vuitton S. A. v. Spencer Handbag Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages

provisions of Trademark Counterfeiting Act of 1984 'would present a potential ex post facto problem')."); Pet. 24.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

Carole O'Blenes
Daniel R. Dominguez
Attorneys for Petitioner

Saul G. Kramer
Wendy L. Kornreich
Of Counsel

July 29, 1994